Office - Supreme Court, U.S.
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No. 496

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL GALGANO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT GALGANO'S APPENDIX

CURRAN, MAHONEY, COHN & STIM,
Attorneys for Defendant-Appellant,
Michael Galgano.

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Docket Entries

Crim. No. C 151-226.

VIOLATION

T 21, Secs. 173-174
T 26, Secs 4704(a) 4701
4703, 4771(a) & 7237(a)
T 18 Sec. 371 USC

Unlawful sale and possession of narcotics and conspiracy
Fourteen Counts.

THE UNITED STATES

VS.

Salvatore Russano—Cts 1-5-6-7-14
Ralph Russano—Cts 1-5-6-7-14
Anthony Carminati—Ct 14
William Mc Kenney Jr. Ct. 14
Frank Rich Cts 3-4-8-14
Robert Guippone Ct. 14
Joseph Ambrosini Cts 9-10-12-13-14
Carlos Ruiz Cts 2-14
Mary Lou Brolet Russano Ct. 14
Sebastian Della Universita Ct. 14
Michael Botto Ct. 14
Michael Galgano Ct. 14
David Shackelford Cts 3-14
Donald Bauer Ct. 14
Ada Volkell Cts. 11-12-13-14

Docket Entries

Date	*Proceedings*
11-19-56	Filed indictment
11-19-56	Mary Lou Brolet Russano pleads not guilty. Bail fixed at $500. Paroled until 11-23-56 to give bail.
	Michael Galgano pleads not guilty. Bail fixed at $7500. Deft. remanded.
	CASHIN, J.
11-21-56	Filed affidavit of John C. Lankenau, Assist. U. S. Atty., for a writ of Habeas Corpus ad Prosequendum for deft. Donald Bauer. Issued Writ. Ret. 11-23-56.
11-23-56	Salvatore Russano—Pleads not guilty—Released in custody of his Attorney—See Cr. 151-78 for bail.
	Ralph Russano—Pleads not guilty—Bail fixed at $20,000 to cover this indictment and Cr. 151-78. Deft. remanded.
	Anthony Carminati—Pleads not guilty—Released in custody of his attorney. See Cr. 151-78 for bail.
	William McKenney Jr.—Pleads not guilty—Released in custody of his attorney. See Cr. 151-78 for bail.
11-23-56	Frank Rich—Pleads not guilty—Bail fixed at $5,000 to cover this indictment and Cr. 151-78, Cr. 151-79 and Cr. 151-27. Deft. remanded.
	Joseph Ambrosini—Pleads not guilty—Bail continued at $15,000.
	Robert Guippone—Warrant of arrest ordered. Warrant issued.
	Carlos Ruiz—Warrant of arrest ordered. Warrant issued.

Docket Entries

Date	*Proceedings*
	Sebastian Della Universita—Warrant of arrest ordered. Warrant issued.
	David Shackelford—Pleads not guilty—Released in the Custody of his attorney. See Cr. 151-79 for bail.
	Ada Volkell—Pleads not guilty—Bail of $3,000 to be rewritten by 4 P. M. today.
	Donald Bauer—Produced in Court on writ and pleads not guilty—Bail fixed at $2,500. Bench Warrant ordered lodged. CASHIN, J.
11-23-56	Filed notice of appearance of Attys Saunders & Franklin, 1650 Broadway, NYC for deft. Ada Volkell.
11-23-56	Filed notice of appearance of Attys Fusco & Lazarus, 458 Brook Ave., Bronx, NY for deft. Mary Lou Brolet Russano
11-23-56	Filed remand for Michael Galgano dated 11-19-56. CASHIN, J.
11-23-56	Filed affdt. and notice of motion for an order severing the indictment with respect to David Shackelford and for a separate trial.
11-23-56	Filed recognizance for Ada Volkell for $3000. Public Service Mutual Ins. Co.
11-26-56	Michael Botto—Pleads not guilty—Released in custody of his attorneys—See Cr. 151-79 for bail. CASHIN, J.
11-30-56	Filed Writ of Habeas Corpus Ad Test. for deft. Donald Bauer dated 11-21-56, and entered Marshal's execution dated 11-21-56. CASHIN, J.

Docket Entries

Date	*Proceedings*
11-30-56	Filed Warrants of Arrest for Defendants Carlos Ruiz and Sebastian Della Universita, dated 11-23-56
12- 3-56	Filed affidavit of John C. Lankenau, Assist. U. S. Atty in opposition to motion for severance of trial of deft. David Shackelford.
12- 3-56	Memo endorsed on motion papers filed 11-23-56. Motion denied. So Ordered. RYAN, J.
12-12-56	Salvatore Russano pleads guilty (Atty present) to counts 1-5-6-7-14. Pre-sentence Investigation ordered. Sentence adjourned until 1-3-57. Bail continued. RYAN, J.
12-12-56	Ralph Russano pleads guilty (Atty Present) to counts 1-5-6-7-14. Pre-sentence Investigation ordered. Sentence adjourned until 1-3-56. Remanded. Order to be signed committing deft to Bellevue Hospital for observation. RYAN, J.
12-12-56	Ada Volkell ordered re-fingerprinted. RYAN, J.
12-12-56	Filed notice of appearance of Bella V. Dodd Atty, 100 W. 42nd St., for defts Salvatore Russano and Ralph Russano.
12-12-56	Filed substitution of counsel Bella V. Dodd for deft. Mary Lou Brolet Russano. Consented to. So ordered HERBERT A CHARLSON, Clerk
12-13-56	Oral motion by Mary Lou Brolet Russano for severance—Denied Exception taken. RYAN, J.
12-13-56	Filed affdt. and notice of motion by Mary Lou Brolet Russano to inspect Grand Jury Minutes. 12-13-56—Memo endorsed—Motion denied. RYAN, J.

Docket Entries

Date	*Proceedings*
12-14-56	On oral motion of Assist. U. S. Attorney Ruskin indictment severed as to Deft. Michael Botto. RYAN, J.
12-17-56	Filed affidavit of Assist John C. Lankenau, Assist U. S. Attorney, for a writ of Habeas Corpus Ad Prosequendum for Donald Bauer. Issued Writ. Ret. 12-18-56.
12-17-56	Filed order committing Ralph Russano to Bellevue Hospital for mental and physical examination. RYAN, J.
12-17-56	Salvatore Russano and Ralph Russano are brought to Court and upon being questioned by Judge Ryan regarding pleas of guilty entered on 12-12-56 they again assert they are guilty as charged. RYAN, J.
12-19-56	On oral motion of Assist. U. S. Attorney Ruskin, indictment is severed as to defendants Joseph Ambrosini and Ada Volkell. RYAN, J.
12-19-56	Florence M. Kelley, Bernard Moldow of counsel assigned to Donald Bauer. RYAN, J.
1- 3-57	Salvatore Russano and Ralph Russano—sentences adjourned until 1-21-57 and both defendants remanded without bail. RYAN, J.
1- 4-57	Filed Affidavit of Robert K. Ruskin, Assist U. S. Atty dated 12-18-56 and true copy of order dated 12-17-56 committing Ralph Russano to Bellevue Hospital, for mental and physical examination for a period of ten days. Ryan, J. Entered Marshal's return dated 12-18-56.

Docket Entries

Date	*Proceedings*
1- 7-57	On motion of the Government, Indictment severed as to David Shackelford and Donald Bauer. SUGARMAN, J.
1- 7-57	Case severed as to Deft. Mary Lou Brolet Russano. Trial begun as to Defendants Anthony Carminati, William McKenney Jr., Frank Rich and Michael Galgano before Judge Weinfeld and jury.
1- 8-57	Trial cont'd.
1- 9-57	Trial cont'd.
1-10-57	Trial cont'd.
1-11-57	Trial con't.—Government rests. Counsel for the defendants move to dismiss and for judgment of acquittal. Motions denied. Weinfeld, J. Deft. rests. Both sides rest. Counsel for defendants renew motions to dismiss. Motion denied. Weinfeld, J. Deft. Frank Rich cited for contempt of Court. WEINFELD, J.
1-14-57	Trial con'd and concluded.—Jury retires to deliberate. Jury returns verdict of "Guilty" as charged. Carminati, McKenney Jr, Galgano guilty on Count 14, Rich guilty on Counts 3, 4, 8 and 14. Defendants remanded. Sentence set for 2-5-57. Pre-sentence report ordered. Bail revoked as to deft. Rich. WEINFELD, J.
1-23-57	Filed affidavit and notice of motion for an order that counts 2-6-8-10-12 and 14 of Indictment C. 151-284 as against Joseph Ambrosini, be consolidated for trial with C. 151-226. (See C. 151-284). Motion argued 1-28-57. Decision reserved. SUGARMAN, J.

Docket Entries

Date	*Proceedings*
2- 2-57	Memo endorsed on motion papers filed 1-23-57. Motion granted. So ordered 2-2-57. (See C. 151-284 for papers). SUGARMAN, J.
2- 5-57	Filed second offender information as to Michael Galgano. The defendant (Atty present) admits he is the person named and charged in the within information. WEINFELD, J.
2- 5-57	Anthony Carminati—Sentence adjourned until 2-15-57. Remanded. WEINFELD, J.
2- 5-57	Filed Judgment as to William McKenney Jr.—Sentence—Five (5) Years on count 14. at a place of confinement to be designated by the Atty. Genl. of the U. S. Remanded. WEINFELD, J.
2- 5-57	Issued commitment and copies.
2- 5-57	Filed Judgment as to Salvatore Russano—Sentence—Five (5) Years on each of counts 1-5-6-7 and 14. to run concurrently with each other at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $1. on count one. Fine remitted. Remanded. WEINFELD, J.
2- 5-57	Issued commitment and copies. WEINFELD, J.
2- 5-57	Filed Judgment as to Ralph Russano—Sentence—Five (5) Years on count 1. and fined $1. Fine remitted. Seven (7) Years on counts 5-6-7 and 14, sentences on counts 1-5-6-7 & 14. to run concurrently with each other at a place of confinement to be designated by the Atty. Genl. of the U. S. Remanded. WEINFELD, J.

Docket Entries

Date	*Proceedings*
2- 5-57	Issued commitment and copies.
2- 5-57	Michael Galgano. (Information filed charging prior U. S. Narcotic Law violation) Filed Judgment as to Michael Galgano—Sentence—Ten (10) Years on count 14. at a place of confinement to be designated by the Atty. Genl. of the U. S. Remanded. WEINFELD, J.
2- 5-57	Filed Judgment as to Frank Rich—Sentence—Five (5) Years on Each of counts 3 and 4. Ten (10) Years on each of counts 8 and 14. Sentences on counts 3-4-8 and 14 to run concurrently with each other at a place of confinement to be designated by the Atty Genl. of the U. S. Fined $1. on counts 3 and 4. Fines remitted. Remanded. WEINFELD, J.
2- 5-57	Issued commitment and copies.
2- 5-57	The Court adjudges Frank Rich guilty of criminal contempt of Court committed on 1-11-57 and defendant sentenced to Ninety (90) Days to run concurrently with sentences on counts 3-4-8 and 14. Weinfeld, J. (See Cr. 152-92 for second citation for contempt of Frank Rich).
2- 5-57	Michael Galgano—Defendant's counsel moves to have court decide defendant is not a second offender pursuant to conviction under count 14 of indictment C 151-226. Motion denied. WEINFELD, J.
2- 4-57	Filed affidavit of Atty Mortimer Sattler (unsigned) dated 1-25-57 in opposition to motion filed 1-23-57. (See C 151-284)

Docket Entries

Date	*Proceedings*
2- 5-57	Filed notice of appeal by Michael Galgano dated 2-5-57. 5.00
2- 7-57	Filed order releasing the deft Michael Galgano upon the posting of security in the sum of $25,000 pending the determination of appeal from the Fed. House of Detent. West St., NYC WEINFELD, J.
2-11-57	Filed remands for Ralph Russano and Frank Rich dated 11-23-56. CASHIN, J.
2- 1-57	Filed remand for Salvatore Russano dated 1-3-57. RYAN, J.
2-11-57	Filed remand for William McKenney Jr and Michael Galgano dated 1-14-57. WEINFELD, J.
2-11-57	Filed true copy of order filed 2-7-57. Deft. Michael Galgano released on bail 2-8-57. Bishopp, Commr.
2-11-57	Filed commitments (4) and entered marshal's returns. Defts. Ralph Russano, Salvatore Russano, William McKenney, Jr. and Michael Galgano delivered to Det. Hdqtrs. NYC 2-5-57 for service or sentence or transfer to another institution by prison van.
2-13-57	Filed notice of appeal by William McKenney Jr. dated 2-13-57. 5.00
2-14-57	Filed Judgment as to Anthony Carminati (Second Offender) Sentence—Ten Years on count 14., at a place of confinement to be designated by the Atty. Genl. of the U. S. Remanded. WEINFELD, J.
2-14-57	Issued commitment and copies.

Docket Entries

Date	*Proceedings*
2-14-57	Filed Second Offender Information—Anthony Carminati (Atty present) admits he is the person named and charged in the within information. WEINFELD, J.
2-15-57	Filed notice of appearance of Attys Curran, Mahoney Cohn & Stims for deft. Anthony Carminati.
2-15-57	Filed notice of appeal as to Deft. Frank Rich dated 2-15-57 5.00 (Copy mailed to Warden, Detent. Home for Men. 125 White St. NYC)
2-15-57	Filed Remand as to Deft. Anthony Carminati dated 1-14-57 WEINFELD, J.
2-15-57	Filed commitment as to Deft. Anthony Carminati and entered marshal's return. Deft. delivered to Det. Hdqtrs. NYC. 2-14-57 for service of sentence or transfer to another institution by prison van.
2-18-57	Anthony Carminati—Oral motion for bail pending appeal—Motion argued. Dec. Reserved. WEINFELD, J.
2-19-57	Filed opinion by Weinfeld, J. #23272: Motion of Anthony Carminati for bail pending appeal is denied.
2-20-57	Filed notice of appeal by Anthony Carminati dated 2-15-57. 5.00
2-26-57	Filed Affidavit for writ of habeas corpus ad Test., as to Deft. Frank Rich. Issued writ. Ret. 2-27-57.
2-27-57	Filed affidavit of John C. Lankenau, Assist. U. S. Atty., dated 2-26-57 for a Writ of Habeas Corpus Ad Testificandum for Marvin Citrin. Iss. Writ. Ret. 2-28-57

Docket Entries

Date	*Proceedings*
2-27-57	Filed affidavit of John C. Lankenau, Assist. U. S. Atty., dated 2-26-57 for a Writ of Habeas Corpus Ad Testificandum for Donald Bauer. Iss Writ. Ret, 2-28-57
3- 1-57	Filed notice against election of service of sentence by Anthony Carminati dated 2-27-57
3- 4-57	Filed true copies of Writ of Habeas Corpus Ad Testificandum (2) for Marvin Citrin and Donald Bauer. Entered execution of both writs on 2-27-57 by U. S. Marshal.
3-11-57	Filed a true copy of a Writ of Habeas Corpus ad Testificandum for Frank Rich dated 2-26-57 and entered Marshal's return dated 2-27-57. Writ Satisfied 3-8-57 LEVET, J.
3-11-57	Filed affidavit of John C. Lankenau, Assist U. S. Atty for a Writ of Habeas Corpus ad Testificandum for Donald Bauer. Iss Writ. Ret. 3-11-57.
2-26-57	Trial begun before Judge Levet and jury as to defts. Mary Lou Brolet Russano, David Shackelford. Ada Volkell and Joseph Ambrosini. (Consilidated with Cr. 151-284).
2-27-57	Trial cont'd.
2-28-57	Trial cont'd.
3- 1-57	Trial cont'd.
3- 4-57	Trial cont'd.
3- 5-57	Trial cont'd.
3- 6-57	Trial cont'd.—Count 3 dismissed as to deft. David Shackelford.
3- 7-57	Trial cont'd.
3- 8-57	Trial cont'd.
3-11-57	Trial cont'd.—Summations.

Docket Entries

Date	*Proceedings*
3-12-57	Trial cont'd.—Summations.
3-13-57	Trial cont'd. and concluded. Jury retires to deliberate. Jury returns verdict of "Guilty", as to all counts of the indictments as to Joseph Ambrosini. "Guilty on count 14 as charged in the indictment as to David Shackelford. "Guilty" on all counts as charged as to Ada Volkell. Jury disagrees as to Mary Lou Brolet Russano. Joseph Ambrosini remanded. Volkell continued on Bail pending sentence which is set for 4-3-57 Room 318. Pre-sentence reports ordered for Ambrosini, Shackelford and Volkell. LEVET, J.
	Bail of $2000. fixed for Shackelford pending sentence. (Bail in 151-79 cont'd)
3-14-57	Filed Writ of Habeas Corpus ad Testificandum for Frank Rich dated 2-26-57. Writ satisfied 3-8-57. LEVET, J.
3-13-57	Filed stipulation dated March 5, 1957 substituting Curran, Mahoney, Cohn & Stim Esqs. of 29 Broadway, NYC in place and stead of Otto F. Fusco as Attys for the defendant-appellant Michael Galgano in a appeal now pending in the US CA. So ordered 3-13-57. HERBERT A. CHARLSON, Clerk.
3-15-57	David Shackelford's bail reduced to $1,000. on this indictment pending sentence. Deft. allowed until 3-16-57 at 11 o'clock to give bail. LEVET, J.
3-18-57	Filed notice that the record on appeal as to Michael Galgano has been certified to the US CA on 3-18-57.

Docket Entries

Date	*Proceedings*
3-20-57	Filed Transcript of record of proceedings, dated Jan. 7, 8, 9, 11, 14 & Feb. 14-1957
3-22-57	Filed Transcript of record of proceedings, dated 2-6-57
3-21-57	Filed Transcript of record of proceedings, dated 3-7-57
4- 3-57	Motion by Joseph Ambrosini to set aside verdict —denied.
4- 3-57	Filed Judgment—Joseph Ambrosini—Ten Years on each of counts 9-10 and 12. Five Years on each of counts 13 and 14. Sentences to run concurrently with each other and concurrently with sentences imposed this day on C 151-284 at a place of confinement to be designated by the Atty Genl. Remanded. Motion for bail pending appeal adjd to 4-5-57. LEVET, J.
4- 3-57	Motion by Ada Vokell to set aside verdict. Denied. Motion by Ada Vokell for mistrial renewed. Denied. LEVET, J.
4- 3-57	Filed Judgment—Ada Vokell—Six Years on each of counts 11 and 12 Five Years on each of counts 13 and 14. Sentences on all counts to run concurrently at a place of confinement to be designated by the Atty Genl. and the Court recommends that she receive medical treatment and hospitalization. Deft. to surrender on 4-5-57. Bail cont'd. Motion for bail pending appeal is adjd to 4-5-57. LEVET, J.
4- 3-57	Issued commitment and copies for defts. Ambrosini and Vokell.

Docket Entries

Date	*Proceedings*
4- 5-57	Filed notice that the supplemental record of appeal has been certified to the US CA on 4-5-57.
4- 8-57	Filed remand dated 3-13-57. LEVET, J.
4- 8-57	Filed commitment and entered marshal's return. Deft. delivered 4-3-57 to Det. Hdqtrs. NYC., for service of sentence or transfer to another institution by prison van.
4-12-57	Oral motion for bail pending appeal of Ada Volkell—Argued. Motion granted and bail is fixed in the sum of $5,000. pending appeal. Deft. allowed until 11 A.M. on 4-15-57 to give bail. Bail of $3,000 ordered continued until new bail is furnished. LEVET, J.
4-12-57	Oral motion by Joseph Ambrosini for bail pending appeal—Argued. Motion denied. LEVET, J.
4-12-57	Filed notice of appeal to US CA by Ada Volkell. 5.00
4-12-57	Filed notice of appeal to US CA by Joseph Ambrosini. 5.00
4-12-57	Filed Bond pending Appeal dated 4-15-57 for Ada Volkell, in the sum of $5,000. Public Service Mutual Insurance Company. (Surety)

Judgment

(91)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 151-226

UNITED STATES OF AMERICA

v.

MICHAEL GALGANO

On this 5th day of February, 1957, came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly conspiring to violate the Narcotic Laws of the United States (Title 26, Secs. 4704 (a), 4701, 4703, 4724 (c), 4771 (a); Title 21, Secs. 173 and 174; Title 18, Sec. 371 USC.) as charged in count 14,

and the defendant, duly represented by counsel, having admitted he is the same person previously convicted on one separate Federal Narcotic Violation, and the court having asked the defendant whether he has anything to say

why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) Years on count 14.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD WEINFELD
United States District Judge

Indictment

(2)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(15)

FOURTEENTH COUNT

1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Schackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as Wilson, white male, blonde hair, 30-35 years of age, approximately 5'11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and

with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

(16) 3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully; wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said

narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of April, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, Robert Guippone, Ralph Russano, Salvatore Russano, and Michael Botto met.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of May, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, Joseph Ambrosini, Ralph Russano, Salvatore Russano, Michael Botto and Frank Rich had a conversation.

(17) 3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1955, in the Southern District of New York, Salvatore Russano and Ralph Russano, sold approximately 2 ounces of heroin to Carlos Ruiz in John's Bar, 180th Street and Third Avenue, Bronx, N. Y.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of September, 1955, in the Southern District of New York, in the Delmont Bar, 624 East 180th Street, Bronx, New York, Michael Galgano and Michael Botto had a conversation.

5. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of October, 1955, in the Southern District of New York, Salvatore Russano, Ralph Russano and Anthony Carminati met David Ogelsby and two unknown men in John's Bar on 180th Street and Third Avenue, Bronx, N. Y.

6. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., Sebastian Della Universita and Michael Botto had a conversation.

7. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, Salvatore Russano, Ralph Russano and Anthony Carminati, had a conversation with David Ogelsby on the corner of Clinton and East Tremont Avenues, Bronx, New York.

8. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of March, 1956, in the Southern District of New York, Salvatore Russano, Ralph Russano, Anthony Carminati, David Oglesby and John Doe, a/k/a Angelo had a conversation in a luncheonette at the corner of East Tremont and Park Avenues, Bronx, New York.

(18) 9. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of June, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., Michael Botto had a conversation with Abraham Schwartz and John Sciarra.

10. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 23rd day of June, 1956, in the Southern District of New York, in the vicinity of 77th Street and Central Park West, Frank Rich sold approximately ½ ounce of heroin to Abraham Schwartz and John Sciarra.

11. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of June, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., David Schackelford received one hundred dollars $100.00) from John Sciarra.

12. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of June, 1956, in the Southern District of New York, in the vicinity of 180th Street and Broadway, New York, N. Y. Frank Rich sold approximately 1 ounce of herbin to Abraham Schwartz and John Sciarra.

13. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of August, 1956, in the Southern District of New York, Salvatore Russano and Ralph Russano sold 35.2 grains of heroin to an agent of the Federal Bureau of Narcotics in a luncheonette at the corner of East Tremont and Clinton Avenues, Bronx, N. Y.

14. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the Southern District of New York, Donald Bauer and Frank Rich met in the vicinity of 51st Street and 8th Avenue, New York, N. Y.

(19) 15. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the vicinity of the Delmont Bar 624 East 180th Street, Bronx, N. Y., Anthony Carminati and Ralph Russano had a conversation.

16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the Southern District of New York, Salvatore Russano and Ralph Russano sold approximately 1 ounce of heroin to Frank Rich in the vicinity of LaFontaine Avenue between 179th Street and 180th Streets, Bronx, N. Y.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of September, 1956, in the Southern District of New York, William McKenney, Jr. had a telephone conversation with David Oglesby.

18. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 25th day of September, 1956, in the Southern District of New York, Joseph Ambrosini while driving a 1956 Oldsmobile between the vicinity of 696 East Fordham Road, Bronx, N. Y. and the vicinity of Fordham Road and the Grand Concourse, sold approximately 2 ounces of heroin to Carrenza M. Howard.

19. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the vicinity of the U. S. Courthouse, Foley Square, New York, N. Y., William McKenney, Jr. and Mary Lou Brolet Russano had a conversation with Michael Botto.

20. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the Southern District of New York, in Silverio's Restaurant, 542 East 180th Street, Bronx, N. Y., Mary Lou Brolet Russano and Sebastian Della Universita had a conversation.

(20) 21. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, Joseph Ambrosini while driving a 1956 Oldsmobile between the vicinity of Fordham Road and 189th Street, Bronx, N. Y. and the vicinity of Tremont and Crotona Avenues, Bronx, N. Y. sold approximately 2 ounces of heroin to Carrenza M. Howard.

22. In further pursuance of the said conspiracy and to effect the objects thereof; on or about the 16th day of November, 1956, in the Southern District of New York, Ada Volkell placed 2 ounces of heroin in a stairwell window ledge located in 496 East 189th Street, Bronx, N. Y.

23. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, Ada Volkell and Joseph Ambrosini had in their possession in apartment E-25 496 East 189th Street, Bronx, New York approximately 8½ ounces of heroin, glassine bags, quinine, sugar, scales, and other miscellaneous equipment commonly employed in diluting heroin.

(Title 18, United States Code, Section 371).

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Foreman

PAUL W. WILLIAMS
United States Attorney

Excerpts From Testimony

* * * * *

MICHAEL BOTTO—for Government.

Direct Examination

(286) During this period did you ever discuss the quality of narcotics with Ralph? A Well, I asked him what kind of stuff it was. He told me it was pure.

Q. Did you have cause to complain that it was not? A. I did.

Q. When was this? A. Some time around September or October I told him that the stuff was getting bad; that I was getting complaints on the stuff.

And he had told me that if I want to pay a little more money he would get me better stuff.

I told him I was willing to pay the extra money.

Q. Well, how much more did he want? A. He told me had a connection for $400.

Q. $400 for pure? A. For an ounce of pure.

Q. Did he say who the connection was? (287) A. I asked him who the connection was. He told me it was Black Mike.

Mr. Fusco: If your Honor pleases, I object to that as certainly not being in furtherance of any conspiracy charged here, and I object to it on the further ground that it is purely hearsay.

Mr. Londin: If your Honor please, the Government contends it is completely relevant and in furtherance of the conspiracy and offers it subject to connection.

The Court: It will be received subject to connection.

Mr. Fusco: We are thus being deprived of the right of cross-examination.

The Court: No, you will have your right to full cross-examination.

Mr. Fusco: Thank you.

Q. Did you ever meet Black Mike? A. Yes, sir.
Q. Did you learn his true name? A. No, sir.
Q. Do you see Black Mike here in court? A. The second on the left.

Mr. Londin: May the record indicate that (288) the witness has identified the defendant Galgano.

The Court: That is Michael Galgano?

Mr. Londin: That is correct.

The Court: When did you meet the man you now identify as Black Mike for the first time?

The Witness: I met him around July or August of '55—1955.

Mr. Fusco: Now, if your Honor pleases, may I ask you to urge this witness to kindly raise his voice and not have this going on in such a secretive way? Will you please ask him to raise his voice so we can all hear it?

The Court: You may move up.

Mr. Fusco: I have one difficulty here as I am looking at him through a corner of the courtroom to begin with.

The Court: Well, move right up to the front here and in that way you can look directly at him.

Mr. Fusco: Thank you.

Q. When did you first meet Mike Galgano?

Mr. Fusco: Hold up will you, please, a moment, and let me be seated, counselor?

Mr. Londin: I am sorry.

A. Some time in the summer of 1955.

(289) Mr. Fusco: Could we have that answer read, your Honor?

The Court: Yes, read the question and answer.

(Question and answer read.)

Q. Now, you just testified that you had a conversation—

The Court: Where did you meet him?

The Witness: I met him in the lunchroom on Third Avenue between Arthur and Hughes I think it was.

Q. Do you know the name of the lunchroom? A. No, I don't know the name of the lunchroom.

Q. Now, after this conversation that you said you had with Ralph in September or October of 1955 did you again discuss the quality of narcotics with Ralph Russano? A. Yes, some time in November of 1955 I told him the stuff was getting bad again, that I was getting more complaints by the customers, and that if it wasn't any better I would have to stop dealing with him.

So he told me to go ahead and stop dealing with him.

So I stopped.

Q. When you got these deliveries of narcotics from the Russanos how were the narcotics packed? (290) A. In a glassine bag which was inside of a bank envelope.

Mr. Londin: Will you please mark these for identification?

(Marked Government Exhibits 8 for identification through 15 for identification.)

Q. I show you Government Exhibit 7 for identificatiion, Mr. Botto, and ask you whether you have ever seen either this or something like it?

Mr. Fusco: I object to that, your Honor, if we ever seen this or something like it.

Mr. Londin: Your Honor, I am not asking the witness whether—I am putting a question to the witness and asking him whether he had ever seen this envelope or if it resembles anything that he had ever seen.

The Court: I will ask him if that resembles an envelope that he has seen.

The Witness: It resembles.

Q. Look at it carefully so that you are quite certain. A. I have seen it, yes.

Q. It is your testimony then that this envelope is similar to the envelope in which you received narcotics? (291) A. Almost the same.

Mr. Fusco: I object to that, if your Honor pleases.

Mr. Kove: Objected to.

The Witness: Almost the same.

The Court: Overruled.

* * * * *

(296) Q. How was the heroin packed, by the way? A. How was it packed?

Q. Yes. A. A glassine bag was inside of a bank envelope.

* * * * *

(313) A. Well, when I got back I had moved out of the place I was living and I moved uptown. And around October 12, 1956, I got arrested on this charge here.

* * * * *

(333) Q. After you made bail and left West Street did you have a conversation with Michael Galgano? A. Yes, sir.

Mr. Kove: I suppose now would be the proper time to object to this testimony, your Honor.

The Court: I do not know the nature of the conversation as yet.

Mr. Kove: Well, your Honor, he said or asked in the question after he had made bail, and certainly that is after the arrest.

The Court: Yes.

This is being received at this point only with respect to the defendant Michael Galgano.

(334) Mr. Fusco: May I object to that, your Honor?

The Court: And I am instructing the jury that it is not to be considered and it is not to be received with respect to any other defendant.

Mr. Fusco: On behalf of Michael Galgano I object, if your Honor pleases.

The Court: Overruled.

Mr. Fusco: Exception.

Q. Can you give us the approximate date of this meeting? A. October 15th or 16th. I think it was the 16th.

Q. And where did this conversation take place? A. The Delmont Bar.

Q. Where is the Delmont Bar? A. Around 180th Street and Third—Hughes Avenue, some place around there.

Q. Do you see here in court the man with whom you had this conversation? A. The second one from the left.

Mr. Londin: May the record indicate that the witness has identified the defendant Michael Galgano?

Q. And did you discuss narcotics with Galgano? A. I did.

(335) Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

The Court: Now, members of the jury, I am emphasizing that this testimony is being received only as against the defendant Galgano; it is not being received as against any other defendant on trial, and you are not to consider it as being against any other defendant.

Q. Did you meet anyone else at this time? A. Yes, I was introduced to Tony Carminati at that time.

Q. Do you see him in court now? A. The fellow on the end.

(336) Mr. Londin: May the record indicate that the witness has identified the defendant Anthony Carminati.

The Court: What date is this?

Mr. Londin: October 16th I think it was, your Honor.

(337) Mr. Kove: That is objected to, your Honor, on the ground that as far as the indictment is concerned it is subsequent to the arrest, the conspiracy having already come to an end.

The Court: It will be received at this time as against the defendant Carminati only, and not as against any other defendant.

Q. Now, you met Carminati on the same day that you spoke to Galgano? A. That is right.

Mr. Kove: What was that date again?

Q. What was this date? A. The day after I got out. I believe it must have been the 16th of October.

Q. And how soon after meeting or talking to Galgano did you meet Carminati? A. About 15 minutes later, half an hour later.

Q. And did you go over yourself? A. No, Black Mike brought me over there.

• • • • •

Michael Botto—for Government—Cross
Discussion

Cross-Examination:

(485) Q. Now, how many times did you say you saw Michael Galgano?

Mr. Londin: May we have some time fixed?

A. The most times I seen him was about three times. That is about the most I ever seen him.

Q. You say you saw him on this day in July or August 1955? A. That is right.

Q. And I think you related to us that after you were released on bail— A. I seen him again.

(486) Q. You saw him again? A. Yes.

Q. And those would be the times which you saw Michael Galgano? A. I told you two or three times was the most I ever seen him.

* * * * *

(491) The Court: Now, do you remember testifying yesterday that you had a conversation with Galgano in October of 1956?

The Witness: Yes.

The Court: Following your release on bail?

The Witness: Yes, sir.

The Court: And do you remember where that was?

The Witness: At the Delmont Bar.

The Court: Now, before I put any further questions, may I say this to the jury;

The Judge has a function under that ruling upon objections and preserving order during the course

of the trial. One of his functions is to keep the issues within scope and ask questions in order to clarify matters that you may be called upon to decide.

Now, the fact that I ask questions is no indication that I have any point of view as to either the witness's credibility or as to how the case is to be (492) decided, nor do I entertain any opinion at all with respect to the subject matter. My asking the questions is simply to clarify the issues that are in the case.

You testified, did you not, that you saw Mr. Galgano at the Delmont Bar?

The Witness: Yes, sir.

The Court: That was in October 1956?

The Witness: Yes, sir.

The Court: Did you have any conversation with him on that occasion?

The Witness: Yes, sir.

The Court: Now, what was the conversation you had with him?

The Witness: Well, I had told him that I had just come out on bail and I had seen Ralph Russano down there and all the fellows that were in on this case——

Mr. Kove: If your Honor pleases, may I on behalf of the defendant Anthony Carminati respectfully object to this testimony as being conversation testimony coming after the date of the arrest?

The Court: This testimony, I will emphasize again as I did yesterday when the witness testified to it on direct examination, members of the jury, (493) is being received only with respect to the

defendant Galgano who is the defendant with whom the witness alleges he had the conversation. In no single respect may it be considered insofar as any other defendant in the case is concerned.

All right.

The Witness: Well, I had met him in the trial and I told him that I just come out on bail and I saw all these people down there, and there was talk about Ralph, about the stuff being very bad, and Ralph told me he had got the stuff from Galgano, and I asked him why the stuff was bad.

Well, he said, when Ralph had got it the stuff was good, he didn't know what Ralph had done with it.

Mr. Fusco: May I continue, if your Honor pleases?

The Court: Is that the entire conversation?

The Witness: Well, about the narcotics, yes, sir.

The Court: All right, proceed.

Mr. Kove: May I take an exception, if your Honor pleases, to protect the record?

The Court: Yes.

Mr. Kove: As to whether that was the entire (494) conversation and the answer made by this witness. That is, I take exception to that and the answer made by this witness.

The Court: You may.

Mr. Kove: Thank you.

* * * * *

Thomas Dugan—for Government—Direct

(587) THOMAS DUGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Lankenau:

* * * * * *

(618) Q. Did there come a time when you arrested Michael Galgano? A. Yes.

Q. Do you see Michael Galgano here in court today? A. Yes. I do. He is the second man to the left.

Mr. Lankenau: May the record indicate that the witness identified the defendant Michael Galgano.

Q. At the time of the arrest of Michael Galgano——

Mr. Fusco: May we have the date, if your Honor please?

(619) The Court: Yes. What date was that?

The Witness: November 19, 1956.

Q. At the time of the arrest of Michael Galgano, did you search the premises, the home of Michael Galgano? A. I did.

Q. What did you find?

Mr. Fusco: I object.

Mr. Fruchtman: Now, if your Honor please, I object to that on behalf of the defendant McKenney, because it is after the arrest of the defendant.

Mr. Lankenau: Now, this testimony is being offered only as against Galgano.

The Court: I take it that you are offering this testimony only with respect to the defendant Galgano.

Mr. Lankenau: That is correct, your Honor.

The Court: And, members of the jury, you will so understand it. It is not to be considered with reference to any other defendant on trial.

Q. Did you make a search of the premises in which Michael Galgano lived at the time of his arrest? A. I did.

Q. What did you find? A. I found about ten bankers envelopes.

Q. I show you Government's Exhibit 33 for (620) identification and ask you if you have seen these before. A. These are the bank envelopes I found on a table in the living room of Michael Galgano's home at the time of his arrest.

Mr. Lankenau: The Government offers at this time Government's Exhibit 33 for identification in evidence.

Mr. Fruchtman: As to whom?

Mr. Lankenau: As to Galgano.

Mr. Fusco: If your Honor pleases, I object on behalf of Michael Galgano on the ground that it is an inference based upon an inference. For that reason I object.

The Court: Overruled.

Mr. Fusco: Pardon?

The Court: Overruled.

(Government's Exhibit 33 for identification received in evidence).

Thomas Dugan—for Government—Cross

Mr. Lankenau: Your Honor, I wish to show these to the jury at some later time.

The Court: You may.

Mr. Lankenau: I have no further questions, your Honor.

* * * * *

(677) *Further Cross-Examination by Mr. Fusco:*

Q. Officer Dugan, or rather, Agent Dugan, you say on November 19 of last year you arrested Michael Galgano; is that true? A. That is true.

* * * * *

(678) Q. Did you take Michael Galgano to his home? (679) Did you go with him to his home? A. I arrested him at his home.

Q. And when you arrested him at his home, was anybody else there? A. Yes.

Q. Was his wife there, if you know? A. Yes.

Q. Did you see any children? A. Yes.

Q. How many children did you see? A. Two children.

Q. Now, I direct your attention——

Mr. Kove: If your Honor please, may we have an instruction that this line of examination applies only to the defendant represented by counsel who is conducting the questioning?

The Court: I have already stated so but I have no hesitancy in repeating it again to emphasize it, that all of this testimony with respect to this defendant Galgano as to incidents on November 19, 1956, is being received in evidence only with re-

spect to the defendant Galgano. It is similiar to the instructions I have given you previously, similar instructions with respect to other defendants.

(680) Mr. Kove: Thank you.

Q. I draw your attention to this exhibit.

Mr. Lankenau: May counsel state what the exhibit number is, your Honor?

The Court: Yes.

Q. No. 33, those envelopes. A. Yes.

Q. Now, Agent Dugan, when you went to the home of Michael Galgano——

Mr. Fusco: Withdraw the question.

Q. As to Exhibit 33, did you find that on a table in the living room? A. Yes.

Q. And did you then search his home? A. Yes.

Q. And did you find any glassine envelopes there? A. No.

Q. Did you search his Home carefully? A. Yes.

Q. Now, did you have a conversation with Michael Galgano pertaining to Exhibit 33? A. I asked him where he got them, where he got the envelopes.

(681) Q. And did he tell you you that those envelopes were used by his two children for banking money and for lunch money? Did he say that to you? A. Well, yes, or words to that effect.

Q. And you saw two children in the apartment, is that true? A. Yes.

Q. Now, did you relate to us Officer or Agent Dugan, all the pertinent conversations that you had with Michael Galgano pertaining to this matter?

Mr. Lankenau: Once again, your Honor, the Government objects to the form of the question.

The Court: Objection sustained.

Mr. Fusco: I respectfully except.

The Court: The witness will answer the questions that are put to him and not decide what is pertinent. He will answer the questions that are put to him on direct and cross.

Q. Now, Agent Dugan, did you talk to Michael Galgano about——

Mr. Fusco: Withdrawn.

Q. Did you show Michael Galgano a photograph? A. At one particular time I did.

Q. Yes, at any time in your conversation. (682) A. Yes.

Q. Did you show him a photograph? A. Yes.

Q. And I show you Government's Exhibit 16— A. Yes.

Q. —was this photograph, or a resemblance of this photograph shown to Mr. Galgano? A. Yes.

Q. And did you ask Michael Galgano if he had a conversation——

Mr. Fusco: Withdrawn.

Q. Now, the person that is represented in this exhibit, can you tell us who it is? A. Michael Botto.

Q. All right. Now, did you have a conversation with Michael Galgano pertaining to Michael Botto? A. Yes.

Q. And did you ask Michael Galgano if he knew the person represented in that photograph there? A. Yes.

Q. Now, did you further ask Mr. Galgano if on October 16, 1956, if he had a conversation with that person represented in that photograph? A. Yes.

(683) Q. And did Michael Galgano say to you that he had a conversation and it looks like the person that is there but wasn't quite sure because he had a hat on at the time? Did he say that? A. Well, this was at—I told him at the time we had that conversation Mr. Lankenau was doing the questioning, and I was present, and as I recall, a statement—while this statement was being taken, he stated that he did not know Michael Botto, or that he could not be sure of who he was.

Q. Did you then have a conversation with him, Agent Dugan, pertaining to someone talking to him on October 16, 1956, at the Delmont Bar and Grill? A. Yes.

Q. And did he tell you that person had a conversation with him about narcotics and that he threw him out of th restaurant? Did he tell you that? A. I believe he mentioned something about throwing someone out of the bar.

Q. Now, did he also tell you that on the day in question there was a barmaid present at the Delmont? A. I don't recall whether he did or not.

(684) Q. Now, did you ask him where he got the blank envelopes, represented by United States Government Exhibit 33? A. Yes.

Q. And did he tell you that occasionally since his brother is a porter at the Delmont Restaurant he banks money for the Delmont Restaurant and Bar at the Bankers Trust? Did he say that to you? A. No, I believe he said that his children brought them home, that they had used them for school, or something like that, or the children had used them to take money to school.

I asked him where he got them, and, as I recall, he said his children brought them home.

Q. And then did you speak to the wife of Michael Galgano to see if that——

Mr. Lankenau: I object, your Honor, conversation——

Mr. Fusco: Let me finish.

The Court: Yes, let him finish his question.

Q. — if that wasn't the fact.

Mr. Lankenau: Your Honor, I object to the question.

(685) The Court: Sustained as to form.

Q. Did you speak to Mrs. Galgano in the presence of the defendant as to whether those envelopes were used by the children for school money and for lunch money? A. Yes.

Q. And did she say that they were so used? A. Yes.

Mr. Fusco: I have no further questions.

* * * * *

SUSAN CAPORASO—for Government.

Direct Examination:

* * * * *

(570) Mr. Fusco: Now, if your Honor please, I say to your Honor that this is improper rebuttal to bring in a statement of Michael Galgano at this time.

The Court: I think I stated earlier also to defense counsel when the question came to going (571) back on cross-examination, that if it was overlooked I will accept it even though it should have been offered in the direct case.

Mr. Fusco: I except.

By Mr. Lankenau:

Q. Do you see that man here in court today? A. Yes, I do. The second on the left in the brown suit (indicating).

Mr. Fusco: If your Honor please, may I raise an additional objection. There is nothing here on the part of the District Attorney that says that he overlooked anything in——

The Court: Why wasn't it offered——

Mr. Fusco: If I may just finish, so the record may be complete.

There is nothing here that the assistant United States attorney stated that shows that he overlooked the offering in evidence of this statement on his direct case, and as to your Honor's remarks, your Honor stated that if anything was overlooked—I don't remember your Honor saying it—that your Honor would permit it——

The Court: Now, first, let us not get into a discussion with respect to whether or not I have (572) indicated to counsel that if matters were overlooked I would permit it, and I am going to call upon counsel sitting at the defense table to state whether or not I did not make this point at some stage during the trial in the robing room.

Mr. Fruchtman: Yes, your Honor, you did. You permitted me to reopen my cross-examination because of something I overlooked.

The Court: After you had concluded and after there had been redirect examination.

Mr. Fruchtman: Yes.

The Court: Didn't I also state that the Court adopts a very liberal policy with respect to the introduction of evidence even though it was not in the regular order? So even though it was overlooked I will accept it, in the exercise of my discretion.

Mr. Fusco: I except.

The Court: Proceed, please.

Mr. Lankenau: May this be marked for identification.

(Marked Government's Exhibits 35, 36, 37 and 38 for identification.)

Q. Miss Caporaso, I show you Government's (573) Exhibit 36 for identification and ask you if you know what that is? A. Yes, that is my shorthand notes of the statement of Michael Galgano.

Q. I show you Government's Exhibit 37 for identification and ask you if you know what that is? A. That is a transcript of my notes.

* * * * *

(574) Mr. Lankenau: Your Honor, at this time I offer in evidence Government's Exhibits 36 and 37 for identification.

* * * * *

Mr. Lankenau: May the record indicate that the witness is now reading from Government's Exhibit 36?

The Witness: "Statement of Michael Galgano.

Discussion

"Before I ask you any questions, Mr. Galgano, I want to advise you of your constitutional right"—

The Court: Pardon me, Miss Caporaso. You know there is a court reporter here, and they (575) are the best in the country. You are going at quite a rate. So just take it easy.

The Witness: "Before I ask you any"——.

The Court: The jurors want to hear and I want to hear, too.

The Witness: "Q. Before I ask you any questions, Mr. Galgano, I want you to advise you of your constitutional right not to answer any of my questions. A. Yes.

"Q. Any answer you give or any statement you make can be used against you at the time of your trial. A. I know.

"Q. Do you understand that you don't have to answer any of my questions? A. That's right.

"Q. Are you married? A. Yes.

"Q. Living with your wife? A. Yes.

"Q. How old are you? A. 43.

"Q. Are you known by any other name? (576) A. Black Mike.

"Q. Any children? A. Two.

"Q. What ages? A. Seven, thirteen.

"Q. Any other dependents? A. No, sir.

"Q. Where do you live? A. 1191 Lakewood Place.

"Q. Do you own your own home? A. Yes, sir."

That is all I have.

Mr. Lankenau: I have no further questions of this witness.

Discussion

Mr. Fusco: I have no questions.
The Court: You may step down.

(Witness excused.)

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Mr. Kove: If your Honor please, at this point at the risk of being repetitious, instead of simply objecting on the ground that this is something that took place subsequent to the consummation of the (577) conspiracy and as obviously being a statement of a co-defendant, I do ask your Honor to repeat the instruction previously given with respect to this, whatever it might be.

The Court: First with respect to the testimony of the last witness, I do not recall that the date was given of the statement. If you will apprise me of the date I will rule.

Mr. Lankenau: Your Honor, the date of that statement was November 19, 1956.

The Court: Under the circumstances the Court again instructs the jury that that statement has been received in evidence only as against the defendant Galgano, whose statement it was, and in no respect can you consider it with respect to any other defendant in the case.

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(578) MILDRED ROTHENBERG, called as a witness on behalf of the Government, in rebuttal, being duly sworn, testified as follows:

* * * * *

(580) (In the robing room.)

The Court: Let the record indicate that counsel for the defendant Michael Galgano, after conferring with the assistant United States attorney, has agreed upon the questions to be read from the question and answer statement taken of the defendant Michael Galgano. Only these questions and answers are to be read to the jury, and all others are to be eliminated.

The Court on its own motion will eliminate any reference in an answer made to any defendant other than Galgano.

(581) Mr. Lankenau: So agreed.

Mr. Fusco: So agreed.

(In the courtroom in the presence of the jury.)

The Court: Are you ready to proceed?

Mr. Lankenau: Yes.

The Court: Mr. Fusco, we may excuse the witness Miss Rothenberg, may we not?

Mr. Fusco: Yes, your Honor, we can.

The Court: Members of the jury, I think you heard right before we took our luncheon recess that a further statement or part of the same statement was taken by Miss Rothenberg from the defendant Galgano; that she transcribed the questions that had been put to him and the answers that he gave. Instead of having her read from her notes the questions and answers that are to be read here or submitted to you, it will be read from the

typewritten statement, and it would be the same as if she read from her notes.

And, incidentally, this evidence now is being received again only as against the defendant Galgano and is not to be considered with respect to (582) any other defendant in the case.

Mr. Londin: "The witness, Michael Galgano, upon being shown Government's Exhibit 16, which is a picture of Michael Botto"——

Mr. Fusco: Could we have the time and place fixed, Mr. Londin?

Mr. Londin: November 19, 1956.

Mr. Fusco: Where?

Mr. Londin: At the office of Mr. Lankenau.

Mr. Fusco: Very good.

Mr. Londin: (Continuing) —"upon being shown this photograph of Michael Botto——

"Q. Do you know this man? A. No.

"Q. Did you ever meet him? A. I don't know him from the Bronx.

"Q. Do you know Mike Botto? A. No.

"Q. This was in the middle of October. Who is Blackie? A. Well, they call me Blackie.

"Q. But who was the Blackie that you said— A. I don't know, I never met him again. This fellow, he come in drunk, just come out of jail (583) and he was talking right to us.

"Q. Is Blackie any one of the men whose pictures I have shown you? A. No, sir.

"Q. Do you want to look through those pictures again just to make sure (shows witness same group of pictures shown before)? A. There is only four of them that I have seen before.

"Q. Do you know this guy Mike Botto? A. No.

Reading From Statement of Michael Galgano

"Q. Where does Blackie live? A. I don't know. First time I seen him. In fact, I am the only one they call Black Mike.

"Q. Have you seen this Blackie before? A. No.

"Q. What does he look like? A. Well dressed, sharp dresser, had money on him, he started buying drinks at the bar.

"Q. How tall is he? A. He looked shorter than I am, about five six I think.

"Q. Did he wear glasses? A. No.

(584) "Q. Full head of hair? A. Had a hat on.

"Q. How old? A. In the forties, the least. He looked older than me.

"Q. Have you ever seen this man Blackie before? A. No, never did.

"Q. Ever seen him since? A. No. He made a call at the bar and when I answered the phone he asked for me. That was the last he ever spoke to me. He said he had a bad record, and he was talking big, I don't know, so I got him by the collar and threw him out of the place."

The Court: Call the next witness.

Mr. Lankenau: The Government rests, your Honor.

The Court: Case closed on both sides.

* * * * *

(585) Mr. Fusco: If your Honor please, I move (586) similarly, as I have at the end of the prosecution's case, and move to have the indictment dismissed; and further, if your Honor please, alleging all the grounds that I did at the end of the prosecution's case, and further move for a directed verdict of acquittal on the grounds that the prosecution has failed to make out a case beyond a reasonable doubt.

The Court: Motion denied.

Mr. Fusco: I respectfully except.

* * * * *

(711) CHARGE OF THE COURT

The Court: Ladies and Gentlemen of the Jury: When you were first selected as jurors I told you that your principal function during the progress of the trial would be to listen carefully to the evidence and to observe the witnesses who testified. It has been evident to me that you have discharged this duty admirably well and have followed the testimony in the case with keen and absorbing interest.

We have now reached the point at this trial where you are about to enter upon your final function as jurors, and here you perform one of the most sacred obligations of citizenship—that is, acting as ministers of justice.

You are to approach your duties in a complete attitude of fairness and impartiality and to appraise the evidence calmly and deliberately—and as was emphasized by me when you were selected as jurors—without the slightest trace of sympathy, bias or prejudice for or against the Government or the defendants as parties to this controversy.

Let me add: the fact that the Government is a party, or that the prosecution is brought in the name of the United States of America, entitles it (712) to no greater and by the same token no less consideration than that accorded to any other party to a litigation.

The glory of our system of justice is that all, the rich and the poor—the powerful and the weak—persons of every race, color or creed, stand as equals before the bar of justice. Your final role is to pass upon and decide the fact issues that are in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence, the credibility of the witnesses, and you determine and resolve such conflicts as there may be in the evidence, and you draw such reasonable infer-

ences as may be warranted by the testimony received in the case. I shall later refer to how you determine the credibility of witnesses.

My function at this point is to instruct you as to the law in the case and it is your duty to accept the law as I state it to you in these instructions and to apply it to the facts as you may find them.

The indictment in this case contains 14 counts—that is, 14 charges of violations of the federal laws by various persons.

(713) But we are concerned in this case with only four counts, the 3rd, 4th, 8th and 14th counts, and with only four defendants: Anthony Carminati, William McKenney, Jr., Frank Rich and Michael Galgano.

Under the 14th count these four defendants, as well as others, are charged with conspiracy to violate certain federal laws enacted in an effort to curb the sale and distribution of narcotics for illegal purposes.

The 3rd, 4th and 8th counts, so-called substantive counts, which are also before you, concern only the defendant Frank Rich. These charge that on the specific dates set forth therein he, Frank Rich, committed an actual violation of the narcotics law as distinguished from a conspiracy to violate the law.

Generally speaking, a substantive count charges a basic violation of the law, for example, in this case, under the 3rd and 4th counts, the illegal sale of narcotics and under the 8th count facilitating the transportation of narcotics.

The conspiracy count against the four defendants and the three substantive counts against (714) Rich are in some respects governed by different laws.

In a conspiracy charge there is no need to prove an actual violation of a specific criminal law, or the sale

and delivery, or the facilitation of the sale and delivery of narcotics.

For two or more persons to conspire or combine to commit, or cause to be committed, a breach of the criminal laws of the United States is an offense of grave character.

It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself. I shall later discuss the conspiracy and the substantive counts in detail.

The fact that one or more persons named in the indictment have pleaded guilty, and further that the indictment has been severed as to other defendants, may not be considered against the defendants on trial.

So, too, you are not to take into consideration that the grand jury named David Oglesby (715) and Abraham Schwartz and others as co-conspirators but did not indict them as defendants.

That must play no part in your deliberations, although you will, as I shall presently tell you, be required to pass upon and evaluate their credibility as witnesses upon this trial.

There are certain fundamental principles of law which apply in every criminal case, to some of which I referred at the time of your selection as jurors.

The indictment is merely an accusation—a charge. It is no evidence or proof of thee defendants' guilt. You will not give any weight whatsoever to the fact that an indictment has been returned against the defendants on trial. They have pleaded not guilty and they have put in issue the Government's charges.

The Government has the burden of proving its charges against the defendants beyond a reasonable doubt, which

is a burden that never shifts and remains upon the Government throughout the entire trial.

The defendants do not have to prove their innocence. On the contrary, they are presumed to be innocent of the accusations contained in the (716) indictment. This presumption of innocence continues in their favor throughout the entire trial. It was, as I told you at the start of the trial, in their favor then; is present during the course of the trial and is in their favor even as I speak to you now, and still continues in their favor during the course of your deliberations in the jury room. It is removed only if and when you, the members of the jury, are satisfied that the guilt of the defendants has been established beyond a reasonable doubt.

Now, the question that naturally comes up is what is a reasonable doubt? The words almost define themselves: that there is a doubt founded in reason, and arising out of the evidence in a case, or the lack of evidence. It means a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense, and your experience. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say (717) that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of a defendant's guilt which amounts to a moral certainty, then you have a reasonable doubt and it is your duty to acquit. On the other hand, if after such an impartial and fair consideration of all the evidence in the case you can candidly and

honestly say you do have an abiding conviction of a defendant's guilt which amounts to a moral certainty, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances it is your duty to convict.

Putting it more simply, if you were confronted with an important decision, and after reviewing all the factors that are pertinent, you are beset by doubt and uncertainty, and unsure of your judgment, then you would have a reasonable doubt. And, conversely, taking into account all the elements that pertain to the problem, you have no uncertainty, you are sure of your action and have no reservation, then you have no reasonable doubt.

Now, with the foregoing general instructions, (718) let us turn to the charges contained in the indictment.

I think it is desirable that we first consider the conspiracy charge since much of the testimony was directed towards it and the same evidence touches upon the substantive charges against the defendant Rich.

The 14th count of the indictment charges a conspiracy to violate specific provisions of the Internal Revenue Code which were enacted by the Congress in an effort to curb the illegal traffic in narcotics.

Thus Sections 4701, 4703, 4704(a), 4724(c) and 4771(a) of Title 26 of the United States Code, sometimes referred to as the Harrison Act, make it an offense to sell or distribute narcotics except from an original container to which are affixed revenue stamps; and also make it illegal for one to sell or distribute narcotic drugs without registering with the Secretary of the Treasury for that purpose.

Then there are Sections 173 and 174 of Title 21 of the United States Code, known as the Jones-Miller Act, which make it a crime to import a narcotic (719) drug into the

United States contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of any such drug after importation—knowing the same to have been imported contrary to law.

These are the laws which the Government charges the defendants conspired to violate.

Thus Count 14 of the indictment charges:

1. Commencing on or about the 1st day of January 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Shackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as (720) Wilson, white male, blonde hair, 30-35 years of age, approximately 5 feet 11 inches tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

Those are the sections to which I made reference in substance which the defendants and others are charged with conspiring to violate.

Now the indictment continues:

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States (721) Internal Revenue Stamps, as required by the various sections to which I have referred of the Internal Revenue Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

The indictment further alleges that:

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotics drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported (722) and

brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

Now, the indictment continues with the overt acts and the first overt act is as follows:

In pursuance of said conspiracy and to effect the objects thereof, on or about the 1st day of April, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, Robert Guippone, Ralph Russano, Salvatore Russano and Michael Botto met.

I should now tell you that in all there are 23 overt acts alleged in this indictment, some of which refer to various persons as alleged conspirators, some defendants, and others only named as co-conspirators, either meeting and having talked, and in some instances the overt act alleges a sale or possession of narcotics. I am not going to read all of the 23 overt acts. I will hand you a copy of the indictment which contains them, but I shall make reference to the overt acts and their significance insofar as the conspiracy charge is concerned.

(723) This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy.

Putting it another way—the defendants are not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th count with a conspiracy to violate those laws.

Now, what must the Government establish to prove a conspiracy? The essential elements of the crime of conspiracy are:

(1) The existence of the conspiracy as charged in the indictment;

(2) That a defendant knowingly associated himself with the conspiracy;

(3) The commission of at least one of the overt acts set forth in the indictment.

(724) Before a conviction may be had against a defendant, the Government must establish each essential element beyond a reasonable doubt. If it fails, you must acquit; if it succeeds, your duty is to convict.

What is a conspiracy? A conspiracy is a combination or agreement of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

In this case the Government contends that the conspiracy was to accomplish an unlawful purpose.

The gist of the crime is the unlawful combination or agreement to violate the law. A conspiracy has sometimes been called a partnership in criminal purposes. However, it is not necessary that two or more persons should meet together, and enter into a formal or written agreement stating that they have formed a conspiracy to violate the law, or the details of the plan or the means by which the unlawful project is to be carried out.

Indeed, it would be extraordinary if there were such a formal agreement. When men, in fact, enter into a plan of that character, much is left (725) to unexpressed under-

standing. Conspirators do not put their statements in writing, nor do they make their plans public.

It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to accomplish an unlawful design, knowing its object.

From its very nature, a conspiracy is almost invariably secret in its origin and execution. In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose. The adage "Actions speak louder than words" is applicable here.

The offense is complete when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objectives of the conspiracy.

The prosecution is not required to set forth in the indictment each and every act upon which it relies to establish a conspiracy or a defendant's (726) participation therein. Neither is the prosecution required to, although it may, prove each of the overt acts set forth in the indictment. Indeed, in this case it has not undertaken to prove all of them. The overt act need be neither a criminal act nor the very crime that is the objective of the conspiracy.

Thus in this case of the 23 overt acts only six charge the sale of narcotics, and the remainder refer to conversations and meetings between or amongst various alleged co-conspirators.

For persons to engage in conversation and to meet of course is not illegal or criminal in and of itself. But

when, as the Government charges, such talks and meetings are for the purpose of furthering the objectives of the conspiracy, then such overt acts or conduct become an element of the crime.

Thus if alleged conspirators meet and discuss the sale, purchase or delivery of narcotics to carry out their illegal objective, or make telephone calls for such purposes, as the Government contends they did on various occasions, that is not innocent talk; it is an overt act in carrying out their criminal (727) purpose.

But, as I have already noted, apart from the foregoing, the indictment itself charges a number of sales and deliveries, including those by Rich on or about the 23rd and 28th of June 1956.

Incidentally, the fact that the overt act is alleged to have occurred on or about the 28th of June and the testimony indicates that in fact, if you do believe it did occur, it was made on the 29th day of June, does not matter.

The same would be true with respect to other overt acts. If you find they occurred on or about the day specified, that would be sufficient.

And so, too, you will recall that in reading the indictment at the very beginning there is a reference to the conspiracy having started some time in 1951. Actually the testimony, if believed by you, would indicate that it started some time in 1955. Again that would not matter if upon these instructions you find a conspiracy existed.

The overt act essential to sustain a conspiracy prosecution need not implicate all the conspirators, nor is it required that each participate, for the act of one conspirator done in furtherance of the (728) conspiracy becomes the act of all.

Neither is it necessary for the Government to prove that each defendant committed a particular overt act, nor

is it required to allege overt acts on the part of each member of the conspiracy.

The guilt of a conspirator is not governed by the extent or duration of his participation. Some may take major parts while others play minor roles. A conspirator need not have originally conceived the conspiracy nor have participated in it from its inception; nor taken part in every step or action in its furtherance; nor is it required that he have knowledge of all its operations.

Even if one entered the conspiracy after it was formed, or if he engaged in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as he was in fact a conspirator.

In a word, he may join at any point in its progress and be held responsible for all that has been done or may be done during its progress.

Simply stated, using the partnership analogy again, by becoming a partner he assumes all the liabilities of the partnership, including those (729) that occurred before he became a member.

Thus, in this case for example, according to Schwartz, he had his first contact with Rich and Botto about May 1956, following which he undertook to buy and sell narcotics.

If in fact you find that a conspiracy existed going back to June 1955, and that Schwartz joined it in May 1956, he would be equally responsible with all other conspirators for all that was done in furtherance of the conspiracy before as well as after his joining.

The law presumes once it is established that a person is a member of a conspiracy, that he continues his membership therein until its termination, and the burden is upon the conspirator to satisfy you by affirmative proof that he withdrew and disassociated himself.

It is not required that all co-conspirators know one another. Again that does not matter if you should find one knowingly joined the conspiracy during its existence.

For example, if you find that one sold or supplied heroin to another knowing that it will be resold, the fact that the original supplier did not (730) know the person to whom the drug was resold, or the ultimate consumer, does not matter.

It is enough that the original supplier of the heroin knowingly joined the conspiracy, participated in it and acted to further the ends of the conspiracy—the overall conspiracy to buy, sell and distribute drugs, if you find that such a conspiracy did exist.

If you find that in fact there was an original supplier who sold to a middle man who in turn sold to an ultimate user or consumer, then each—supplier, middle man and user—was a link in the sale and distribution of narcotics; and if the evidence warrants it, you may find that all of them were engaged in an illegal venture in which each played a role upon which the success of the whole venture depended and their knowingly participating in the conspiracy; that is, if they knowingly participated in the conspiracy then each is guilty. In these circumstances it matters not that the supplier did not know the user.

You are not to judge the character and effect of the conspiracy by dismembering it and viewing its separate parts, but only by looking at it as a (731) whole. You must first determine from all the evidence in this case whether or not a conspiracy as charged in the indictment existed.

It is sufficient, if from proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding way so as to bring about a deliberate agreement to do the act or acts as charged in the indictment.

Charge of the Court

If you conclude that a conspiracy did exist, you must determine next as to each defendant whether or not he was a member of the conspiracy. In considering whether or not a defendant on trial was a member of the conspiracy, you must do so without regard to, and independently of, the statements, acts or declarations of others.

On this subject, a special word. You will recall, and I underscored it several times, that the acts and statements made by one alleged co-conspirator in the absence of other defendants or alleged co-conspirators were received in evidence on a conditional or tentative basis. This applies to testimony given as to various acts or statements (7332) allegedly made by the defendants on trial, as well as those of Russano and other alleged co-conspirators. Such acts, declarations, or admissions were received at the time in evidence against the particular person making them. However, with respect to the absent defendants, such testimony was received subject to independent proof of the existence of the conspiracy, and such absent defendant's knowing participation in the conspiracy.

In other words, the alleged participation by a defendant in the conspiracy cannot be established against him by the acts and declarations of any of his alleged co-conspirators done or made in his absence. A defendant's connection with the conspiracy must be established by independent proof based upon the reasonable inferences to be drawn from such defendant's own actions, his own conduct, his own statements or declarations, his own connection with the actions and conduct of the other alleged co-conspirators.

Each defendant's acts and declarations may be evidence of his own connection with the conspiracy, and the conspiracy may be proved by the sum (7333) total of the

independent acts and declarations of all of the alleged participants.

However, once you are satisfied beyond a reasonable doubt that a conspiracy existed and that a defendant on trial was a member of the conspiracy, using the test of independent proof I have described, then the acts and declarations of any one of the other persons whom you may find was also a member of the conspiracy, made during the pendency of the conspiracy and in furtherance of its objectives are considered the acts of all the others, even though they were not present.

Summing it up in a simple way, if there was in fact a partnership in crime, then any act or statement or declaration of one partner in furtherance of the partnership's purposes becomes and may be considered the act or statement of all the partners.

Well, to make the subject more specific, and only by way of example, if you should find a conspiracy existed, and that the Russanos were members of the conspiracy, then if you find that the Russanos sold heroin to Botto and Oglesby as they testified, and also made statements in (734) furtherance of the conspiracy, such statements or acts, if you find that they in fact did occur, would be binding not only on the Russanos but also on any other defendant, even though not present, if such defendant was a member of the conspiracy.

In this connection a word with respect to Oglesby and Schwartz. If you find, as the Government charges, that they were members of the conspiracy, then the same thing would be true even though they were not indicted as defendants, but named only as co-conspirators. As co-conspirators their acts and statements would be binding upon such defendants whom you may find were members of the conspiracy.

Charge of the Court

At this point I again emphasize my instructions repeatedly given during the trial; that is, that any statement made by a defendant subsequent to his arrest was received in evidence only as against and limited to that particular defendant. In no respect may you consider such evidence with respect to any other defendant. Again the partnership analogy applies. Since an alleged partner's participation in the conspiracy would end with his (735) arrest, he could only speak and act for himself.

The law recognizes two types of evidence; direct and circumstantial, upon which jurors may rely to find an accused guilty of crime. The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the facts to be proved. Direct evidence is where a witness testifies to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

In the case of circumstantial evidence, proof is given of facts and circumstances, from which one may infer other connected facts, which reasonably follow in the common experience of mankind.

Stated somewhat differently, a circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts, which have a logical tendency to lead the mind to a conclusion that the facts exist which are sought to be established. Such evidence, if believed is of no less value than direct evidence, for in either case you mu t be convinced beyond a reasonable doubt of the guilt of the defendants.

(736) Now, one simple example perl aps will illustrate what is meant by circumstantial evidence. Assume that when you had entered this courtroom early this morning

the sun was shining brightly, we know it was not raining, and assume the shades had been drawn all day long and none of us had gone outside. Now, if at this moment somebody walked into this courtroom with his coat covered with snow, while actually we did not see the snow because the blinds had been drawn all day, it certainly would be a logical inference that it was snowing at some time during the day although when we entered the courtroom the sun was shining.

It is not required that the conspiracy be established by direct evidence. Indeed, it is rarely susceptible of proof by direct evidence. The agreement of conspiracy is generally a matter of inference, deduced from the acts of the persons accused, which are done in furtherance of an apparent criminal purpose. A conspiracy and a defendant's participation may be inferred from such facts and circumstances in evidence as logically tend to sustain that inference.

(737) In this case the Government relies upon both direct and circumstantial evidence. With respect to circumstantial evidence, if the reasonable inferences to be drawn from the evidence lead to two conclusions—one favoring guilt and the other favoring innocence—then it is your duty to accept that which favors innocence.

To find any defendant guilty of conspiracy, you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any alleged co-conspirator is insufficient. So, too, mere association of one defendant with another does not establish the existence of the conspiracy.

The Government must establish beyond a reasonable doubt that each defendant entered into the conspiracy with a specific criminal intent; that is, with a bad motive and with a deliberate purpose to violate the law.

The question of wilful intent is one of fact. Clearly it concerns what is in one's mind and the purpose which motivates him in his course of conduct. Medical science has not yet devised an instrument to record criminal or wilful intent. It is a mental process, an attitude. Obviously (738) direct proof of it is not available.

Intent and motive are determined from the acts, conduct and circumstances, and such inferences which may reasonably be drawn or arise from a combination of acts and circumstances.

If you find circumstances of secrecy, intrigue or deviousness, or attempts to conceal the real nature of a transaction, you may consider them along with the other evidence in the case.

With these general principles as a guide, you will approach the important questions of whether the prosecution has proved beyond a reasonable doubt the existence of the conspiracy alleged in the indictment, and if such conspiracy did exist whether a defendant on trial was a party to it, and whether he entered into it with knowledge of its nature and purposes.

There has been much testimony which, from its very nature, has spread out in different directions. Some of the testimony is of course applicable to the substantive counts which I shall presently discuss.

I think it desirable so as to bring the evidence within the framework of the charges contained (739) in the indictment, to review the testimony in broad outline and in particular, insofar as it pertains to each defendant.

To establish the conspiracy and the participation therein by the individual defendants on trial, the Government relies in the main upon the testimony of David Oglesby, Michael Botto, Abraham Schwartz, and Narcotic Agents Johnson, Giorgio and Dugan.

Botto, who is named as a defendant, has as you know pleaded guilty.

Oglesby and Schwartz are named as co-conspirators but not as defendants.

Salvatore Russano and Ralph Russano, two defendants named in the indictment as co-conspirators with the defendants on trial, appear to be at the center of the conspiracy charged.

According to the testimony given by various witnesses called by the Government, the Russanos engaged in extensive sales and dealings in narcotics over a period of time and one or more defendants are charged with specific conduct which the Government contends establishes their participation in the claimed conspiracy.

(740) Oglesby testified that from June 1955 and through the following year, he purchased heroin from the Russanos, each of whom he identified in the courtroom, about once a week, or every ten days; that in all he bought 40 or 50 ounces for which he paid $600 an ounce on the average for pure stuff. Oglesby you will recall used the word "stuff" interchangeably with the word "heroin."

Botto also testified that commencing about June 1955 and for almost a year thereafter, with some interruption because of a dispute as to quality, he too bought heroin from the Russanos, on the average of one or two ounces a week, at $300 for cut stuff.

Agent Johnson testified that he was introduced by Oglesby to the Russanos; that on August 20, 1956 he purchased from them an ounce of heroin which, as directed, he picked up from the cushion of a car which Sal Russano had driven to the Cosmos Restaurant; that the outer envelope was a Bankers Trust envelope in which was a glassine case.

Agent Dugan gave testimony which tended to corroborate Johnson and Oglesby's testimony as to events on August 20th.

(741) A chemist testified that the contents were heroin.

The Bankers Trust Company envelope is Exhibit 7 in evidence, and is similar to Exhibit 18, an envelope picked up at John Sciarra's home following Schwartz's arrest on June 29, 1956, who claimed he received it from Rich that day. Within this envelope was a glassine envelope, the contents of which a chemist testified was heroin.

Government's Exhibit 7 is also similar to Exhibit 33, the twelve Bankers Trust envelopes which Agent Dugan found on a table in the defendant Galgano's home when he was arrested.

Agent Dugan also testified that on August 22, 1956 he and Agent Coxe had the Delmont Bar under surveillance; that he observed the defendant Anthony Carminati engage in a conversation with Ralph Russano; that thereafter the Russanos drove to a building at East 180th Street; that one of the Russanos entered the building and returned in a few minutes, following which they drove to La Fontaine Avenue, where Frank Rich, a defendant on trial, emerged from a car, had a conversation with those in the Russano car, with his head and upper part of his body in the car; (742) that this lasted a minute or two, following which Rich re-entered his car, and thereafter there was the chase and the smash-up; and also the finding of the envelope in the rear of the smashed car, the contents of which have been testified to as containing heroin.

In broad outline, this series of continued transactions by Oglesby and Botto with the Russanos, and the incidents I have referred to, as well as other testimony I

have not mentioned, touching upon the defendants and alleged co-conspirators, is relied upon to establish a conspiracy to violate the narcotics laws.

Now let us turn to evidence offered by the Government to support its charge that the individual defendants were members of the conspiracy.

First as to Carminati: Oglesby testified that some time in October 1955 while at John's Bar at Third Avenue and 180th Street in the Bronx, three men entered and engaged in conversation with the Russanos, and he heard Ralph and these men talk about "three pieces." Oglesby testified that in the jargon of the narcotics world, a "piece" means (743) an ounce of narcotics.

That thereafter Ralph telephoned and soon a fellow came in and talked with the three men; that later that night, as arranged, he made a purchase of an ounce of heroin from Ralph Russano for $600.

Several nights later the same three men entered the restaurant, again talked with the Russanos, following which Ralph Russano made a telephone call; that he, Oglesby, saw one of the men throw seven quarters on the bar; that a man entered and asked "What's happening; three the other night and seven tonight. What's happening to these guys"? He later knew this man as Little Tony, whom he identified in this courtroom as the defendant Anthony Carminati.

Oglesby testified to other incidents involving Carminati. Thus he swore that in November 1955 at a luncheonette at Park and Tremont Avenues he asked the Russanos for an ounce of heroin; that soon Tony, the defendant Carminati, and a man named Angelo, entered and conversed with the Russanos, following which he was told by Ralph Russano he would receive a call; later that night Ralph

Russano (744) delivered to him 2 ounces of heroin for which he paid $1100.

Oglesby claims that subsequently in December 1955 at the Cosmos Bar, he had direct contact with Carminati. This came about when he demurred to the Russanos' suggestion to buy seven ounces of cut or diluted heroin instead of pure heroin.

Ralph Russano then said he would see what he could do and made a phone call, and soon the defendant Carminati entered the restaurant and he, the Russanos and Oglesby conferred and finally Carminati told Oglesby "I'm sorry, Big Boy, you'll have to take seven ounces of cut stuff." Oglesby claims he still refused to buy the cut stuff and the Russanos arranged to borrow an ounce of heroin.

Later in June 1956 Oglesby testified that when he wanted two ounces of heroin on consignment, because he was short of funds, the defendant Carminati told Ralph Russano, of whom the request had been made, not to close the transaction on that basis because Russano would be putting himself in the middle.

In all, Oglesby claims he saw or talked to (745) Carminati on some four occasions.

And then there is the testimony of Agent Dugan having observed Carminati engage in conversation with Ralph Russano on August 22, 1956 outside the Delmont Bar, to which I have already made reference.

It is upon this evidence that the Government contends it has established Carminati's participation in the conspiracy.

Charge of the Court

Now, as to the defendant McKenney:

To establish McKenney's participation in the charged conspiracy the Government relies upon the testimony of Oglesby, Botto, Agents Dugan and Giorgio.

Oglesby says he met or saw McKenney, whom he originally knew as Rocky, in March or April 1956 while talking with Ralph Russano; that in August 1956 after attempting to arrange for the purchase of narcotics by Agent Johnson from Ralph Russano, the latter said he was not in a position to close the deal, but he would call Rocky, the defendant McKenney, to handle the matter; that he, Oglesby, met the defendant McKenney at 176th Street and Broadway and told him that because his friend had made another purchase his money was tied up; that they (746) arranged to meet the next day, but never did meet.

Oglesby further testified that in August 1956 at the Cosmos Restaurant, Sal Russano in the presence of McKenney said that he, Russano, would have to let matters cool off for a while and take things easy, but that in the meantime McKenney would take care of matters.

Botto also gave testimony as to McKenney. His testimony is that on or about October 18, 1956, outside of a courtroom in this building he met McKenney together with a defendant not now on trial, Mary Lou Brolet Russano—referred to as Pat Russano;

That on this occasion Pat Russano asked if he needed stuff and to meet her at 10 that night and she would arrange a connection;

That in the company of Agent Giorgio they did have an original meeting that evening and later in an Italian restaurant McKenney stated that Sonny Della Universita

wanted to buy an ounce but he refused to sell it to him because he didn't have enough money.

Agent Giorgio also testified with respect to McKenney on the evening of October 18th and events earlier that day. (747) The agent swore that outside the courtroom he heard McKenney ask an unidentified person if "Uncle Tony" still had the stuff, to which she replied she didn't know, but he insisted that it must still be there.

Giorgio further testified that on that evening he and Botto met McKenney and Pat Russano at a pizzeria and after Sonny Della Universita, named as a defendant and co-conspirator, had left, he, McKenney, said, "how do you like that; he was trying to score with us and had only $200, not $300."

Incidentally, I again emphasize instructions repeatedly given during the trial, that this testimony was received only as against the defendant McKenney and any statements or acts of McKenney on this occasion may not be considered by you with respect to any other co-defendant or alleged co-conspirator on trial.

Similar instructions, of course, are applicable to situations involving other defendants, as I mentioned at the time the evidence was given.

Now, let us turn to the evidence offered by the Government with respect to the defendant Rich:

(748) Here the Government contends that it has established his participation in the conspiracy principally through the testimony of Botto, Schwartz and Dugan.

Botto testified he met the defendant Rich, whom he knew as Richie, in July or August 1955, at which time they discussed narcotics, and Botto asked Rich to take care of his, Botto's, night customers; that Rich did this

for about a month and was paid a weekly sum for his services; that thereafter Rich became Botto's partner; that Botto introduced Rich to the Russanos and arranged to buy an ounce of heroin from them; that thereafter he and Rich made various purchases from the Russanos; that with some interruption due to the quality of the drugs, they bought one or two ounces of heroin a week until June 1956.

Botto also testified that he and Rich sold cut stuff to one Donald Bauer at $100 an ounce on the average of once a week from November 1955 to June 1956.

Botto further testified that while in prison in January 1956 he met Johnny Sciarra who came around in April 1956 and asked to be set up in the dope (749) business; that he introduced Sciarra to Rich and the latter discussed narcotics; further that Rich told him while he was in prison Rich and Shackelford worked together; and it was arranged that Shackelford should continue to work for them at $100 a week. Shackelford, according to Botto, held the narcotics and sold to customers.

Later in March 1956 when Rich was in Connecticut, Botto and Shackelford worked together and that thereafter all three continued in business in April 1956 upon Rich's return from Connecticut.

Botto also testified Rich told him some time in August 1956 that after making a purchase of an ounce of heroin from Ralph Russano, narcotics agents stopped him, Rich, and in backing up his car to get away from them he crashed into an el pillar.

Schwartz testified in substance that he met both Rich and Mike, who he identified as Botto, through Johnny Sciarra;

That Rich told them he wanted to give up selling to users; that Schwartz and Johnny Sciarra arranged to go into the narcotics business and to buy their supply from Rich, who also was to transfer (750) customers to them; that in fact Rich thereafter introduced him to Freddie and Vickie, who allegedly were users.

According to Schwartz, he and Sciarra made two purchases from Rich, one about the third week of June 1956 and the second purchase on June 29, 1956.

Incidentally, the first purchase is made the basis of one substantive count (Count 3) and the second purchase the basis of another substantive count (Count 4) of the indictment against Rich.

Schwartz further testified that the first purchase made from Rich was cut or diluted and thereafter some six or seven sales of the cut narcotics were made by him and Sciarra to Freddie and Vickie, the customers they claim they acquired from the defendant Rich.

Agent Dugan gave testimony also as to Rich, and I have already made general reference to events on August 22, 1956, when, according to Dugan, the car driven by Rich crashed into the elevated pillar and when Rich managed to get away.

The heroin which Dugan testified was found in the rear of the car by Patrolman Costello is made (751) the subject of another substantive count (Count 8) against Rich.

Miss Virgit Young testified that Rich told her he was chased by officers and his car crashed into a pole; further that he also told her that he and Botto, whom she identified from Exhibit 16, used to be partners.

With reference to Galgano, the Government offers the testimony of Botto and Agent Dugan.

Botto testified that he met Galgano in July or August 1955 when he was introduced as Black Mike by Ralph Russano. The Government points to Galgano's admission in a statement made to an assistant United States attorney, that he was known as Black Mike.

Botto testified that on or about October 16, 1956 he had a conversation with the defendant Michael Galgano at the Delmont Bar, at which time he complained about the quality of the drugs he was buying from Ralph Russano at $400 an ounce; that Russano had told him he was getting the stuff from Galgano; that thereupon the defendant Galgano said when he gave the stuff to Ralph Russano it was good, and he didn't know what Russano did with it.

(752) The Government also relies upon the Bankers Trust Company envelopes seized at the Galgano home upon his arrest as circumstantial evidence to support its charge of Galgano's participation in the conspiracy.

The Government also stresses the denial by Galgano when questioned by Dugan upon his arrest that he knew Botto;

his repetition of his denial before the assistant United States attorney, and his denial that he recognized Botto when shown Government's Exhibit 16.

An exculpatory of false statement, for example a denial by one defendant that he knows another, if in fact untrue, is circumstantial evidence from which consciousness of guilt or criminal intent may be inferred. However, this may not, in and of itself serve as a substitution for other proof. It may be considered by you as lending strength to other and more tangible and more direct evidence.

That is the essence of the Government's case both with respect to the conspiracy and alleged participation by individual defendants.

The defendants, to counter the Government's (753) case, in large measure point to the fact that some of the principal witnesses called by the Government have extensive criminal records and by their own admissions were engaged in the very conspiracy charged in this indictment and, accordingly, they press the untrustworthiness and unreliability of the testimony so offered.

In addition they point to contradictions in the evidence offered by these witnesses, as well as what they contend are contradictions with the testimony of other Government witnesses.

Further, that a number of incidents relied upon to establish guilty knowledge or guilty conduct are as consistent with innocence as with guilt.

Also, the defendants rely upon the presumption of innocence as evidence in their favor.

In addition, the defendant McKenney called witnesses who directly challenged in particular the testimony of Government witnesses Botto and Giorgio as to events in this court house on or about October 18th.

Three witnesses—Eldio Guido, Sadie DeLissio, an aunt of the defendant McKenney, and his mother Vivian Piranni, all testified, and they are in (754) agreement that at no time was any statement made by the defendant McKenney to his aunt—in words or effect, asking if "Uncle Tony" still had the stuff, to which she replied that she didn't know, and that he insisted it must still be there. Here is a direct issue of fact as to what transpired. Incidentally, the witness Sadie DeLissio testified that her husband is known as Uncle Tony.

The defendant Galgano put in issue Botto's version that on October 16th at the Delmont Bar when he, Botto, claims that in answer to his question as to why the stuff he was

buying at $400 an ounce from Russano was bad, Galgano told him that when he gave the stuff to Ralph Russano it was good and he didn't know what Ralph did with it.

To support his challenge to this testimony, Galgano called Martha Bridges who was employed at the Delmont Bar as a bar maid. She testified that Botto, whom she identified from Exhibit 16, a photograph in evidence, asked for Mike; she went out to get Galgano, who was outside the bar; that he looked in and said he didn't know Botto; that soon Galgano entered through a rear entrance where Botto joined him; and that after drinks were ordered she heard Galgano (755) raise his voice, take Botto's money off the bar and order him to get out, take a taxi and go downtown where he belongs, and that Botto left.

Thus on the testimony of both the Government and the defendant's witness, Bridges, on this issue—Galgano and Botto did meet, but what is in dispute is what was said on the occasion.

You know that Galgano in his statement to the assistant United States attorney denied knowing Mike Botto and also denied that he knew the person appearing on Exhibit 16, which all counsel concede is a picture of Botto.

When questioned by the assistant United States attorney as to an incident at the bar on October 16th, Galgano said that not Botto but a person known to him as "Blackie" entered the bar, talked big and that he threw him out.

At the time of his arrest, according to Dugan, Galgano said with respect to such an incident that a person did have a conversation with him as to narcotics and that he threw him out of the bar.

It is for you to decide whether or not Botto and Galgano did in fact meet at the bar, and if they (756) did it is also for you to decide what was said or discussed. You ask

yourselves and decide whether Botto's statement is false or true. You ask yourselves whether Galgano's denial that he knows Botto or that he was present is false or true. You determine the issue.

As to the Bankers Trust Company envelopes which were found in his home and which are similar to a number in evidence, the defendant Galgano contends that no guilty inference is warranted. He points to Dugan's testimony that both Galgano and his wife told him their children used the envelopes for school money or lunch money. Thus he contends that no adverse inference is warranted and that the presence of the envelopes is as consistent with innocence as with guilt; that in fact they were there, as he contends, only for use by his children.

Now let us consider the substantive counts. As I have already noted, the testimony relied upon to establish the three substantive counts is in part the same as that relied upon to establish the three substantive counts is in part the same as that relied upon to prove Rich's participation in the conspiracy.

The first substantive count; that is, Count 3 of the indictment is based upon Schwartz's testimony (757) that about the third week in June 1956 in Central Park West, he and Sciarra purchased ½ ounce of heroin from the defendant Rich.

The second substantive count—Count 4 of the indictment—relates to the purchase of one ounce of heroin which Schwartz says they made on June 29, 1956, on which day they were later arrested.

And the third substantive count against Rich—Count 8 of the indictment—is based upon the testimony of Dugan that a package was found in the rear of the crashed car on August 22, 1956.

The Jones-Miller Act, to repeat, makes it a crime to import a narcotic drug into the United States contrary to law, or to receive, conceal, sell or facilitate the transportation, concealment, or sale of any such drug after importation, knowing the same to have been imported contrary to law. Thus you see the violation of the statute is not limited to a sale. It encompasses other activities. The essential elements of the offense are:

(1) the receiving, concealing, selling and facilitating the transportation of the heroin;

(2) that it was unlawfully imported;

(758) (3) that the defendants had knowledge of its unlawful importation.

Obviously also basic is a finding that the substance contained in the various exhibits relating to specific counts was in fact heroin, which I charge you as a matter of law is a narcotic drug.

A chemist has testified to the contents of some exhibits in evidence, and there appears to be no serious dispute as to the nature of such contents. However, since it is an essential element, you must also find beyond a reasonable doubt that the substance was in fact heroin.

The burden of proof with respect to these counts is always upon the Government to prove each essential element of the crime beyond a reasonable doubt. If it fails to do so, it is your duty to acquit; if it succeeds, it is your duty to convict.

I direct your attention to another provision of the Jones-Miller Act. You will recall that two essential elements of the offense charged are:

(1) that the heroin was unlawfully imported; and

(2) that the defendant had knowledge of the unlawful importation.

(759) It will occur to you that no direct evidence was offered by the Government that the drug was imported or that the defendant had knowledge of such importation. However, Section 174 of Title 21 of the United States Code, in the Jones-Miller Act, further provides:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Thus under the law possession of narcotics gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation.

Again, you understand it is not necessary to show actual physical or direct possession by any defendant. Possession of any sort—either actual or constructive—is sufficient to raise the presumption under the statute which I have just read to you and to place upon the accused the burden of explaining the possession to the jury.

(760) If you find that Schwartz did make the purchases as he claims in June 1956 directly from Rich, obviously Rich to hand it over to him had to have possession, and absent any explanation you have a basis upon which to infer he knew that the drugs had been unlawfully imported.

With respect to the 8th count of the indictment relating to events on August 22, if you find that Rich was driving the car; that the heroin was found in the car; and that it was in the car when Rich ran from it; if you accept Agent Dugan's version of what transpired thereafter, you may draw an inference that he had possession of the heroin, even though it was found in the rear of the car.

Incidentally, and this also applies to the conspiracy count as far as Rich is concerned, if you accept Dugan's testimony that Rich fled when ordered to surrender to him as a Federal officer, you may consider this as circumstantial evidence of consciousness of guilt.

Now I have sketched in broad outline the evidence and contentions of the defense and prosecution. In making reference to the testimony of witnesses I have not attempted to touch upon all (761) the evidence or contentions of the parties, and my failure to note other evidence is no indication that it has been disregarded to that I am placing emphasis upon such testimony to which I adverted. My review of the evidence was to focus attention toward some of the issues and facts to be considered by you. All evidence in the case is important and must be considered by you in determining the issues.

In my discussion of testimony given by the witnesses I have attempted to state the same with complete accuracy. However, if your recollection of the evidence differs from mine, I repeat what I have said several times during the trial: it is your own recollection that governs and you must have no hesitancy, and I emphasize this as strongly as I can, in rejecting any reference by me to evidence which does not accord with your own recollection.

I have sought to avoid any comment which might suggest my personal views on the weight of the evidence, the

credibility of the witnesses, the inferences to be drawn, or the importance of one phase or segment of testimony as compared to another, and no comment made by me was intended to suggest any (762) personal view I may have.

As I told you when I questioned witnesses, the sole purpose was to clarify matters as to which testimony was given. These questions, as emphasized at the time, must not be considered in anywise as any indication of attitude with respect to the credibility of the witness. You are not to assume that I have any view as to the credibility of the witnesses or the guilt or innocence of the defendants.

The overruling or sustaining of objections, whether made by defendants' counsel or the Government counsel, is not to be taken by you as any indication of the guilt or innocence of the defendants. Counsel for the defendants not only have the right but it is indeed their duty, on the introduction or the offer of certain evidence, to present whatever legal objections there may be to its admission. So, too, in the instance of counsel for the Government. They are simply performing a duty on behalf of their respective clients.

Now out of the welter of testimony that we have had in this case you are called upon to determine the issues. How do you determine where the truth lies? In your search of the truth you are to be (763) guided by your plain, everyday common sense.

I frequently say to jurors when they enter the door of that courtroom and sit in the jurybox that they are not supposed to leave their common sense outside. You are all persons of experience, drawn from all walks of life. You determine a fact issue, involving whether a person is truthful, in substantially the same way you would determine that kind of question if you were called upon to

act in an important matter where you were personally involved.

You have seen the witnesses on the stand and observed their manner of giving testimony. The degree of credit that is to be given to a witness should be determined by his demeanor, his conduct, his relationship to the parties, his bias or impartiality, the reasonableness of his statements, and any motive to testify falsely, the strength or weakness of his recollection, viewed in the light of all other testimony, and the attendant circumstances in the case.

How did the witness impress you? Was he frank? Did his version appear straightforward and candid? Did he try to hide some of the facts? (764) Is the witness interested in the outcome of the case? Is there a motive to testify falsely?

In other words, what you try to do, to use the vernacular is to size a person up just as you would do, as I have said before, in any important matter when you were undertaking to determine whether or not a person is truthful, candid and straightforward.

Oglesby, Botto and Schwartz, who gave evidence upon which the Government relies, were by their own admissions participants in the alleged conspiracy.

In the eyes of the law they are accomplices in the crime charged against the defendants. In addition Oglesby and Botto have prior criminal records, the latter a rather extensive one.

In the prosecution of crime the Government is frequently called upon to use witnesses who are accomplices or persons with prior criminal records. Often it has no choice. After all, the Government must rely upon witnesses to transactions, such as they are. Otherwise, in many instances, it would be difficult to detect and prosecute wrongdoers.

And this is particularly so in cases of (765) conspiracy. Conspirators do not publicly proclaim their intentions, or operate in public. Conspirators necessarily are often secretive and devious in their activities, and clandestine in their meetings. Frequently it happens that only members of the conspiracy have evidence which is relevant to and important in the case.

There is no requirement in the Federal courts that the testimony of an accomplice be corroborated. Conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible.

It should be pointed out, however, that the Government does claim corroboration as to portions of the accomplices' testimony. Oglesby, Botto and Schwartz have openly admitted their wrongdoing upon the witness stand. The fact that they have lived beyond the pale of the law, and by their own admissions have been accomplices in the very crime charged against these defendants, may be considered by you as bearing upon their credibility and the weight to be given to their actions.

However, it does not follow because a person has a criminal record, or has acknowledged participation (766) in the crime charged against the defendants, he is not capable of giving a truth version of what occurred. His testimony, however, should be viewed with great caution and scrutinized carefully.

Is their testimony against these defendants false? Is it made of whole cloth? Has it been inspired by animus against a defendant? Has it been induced by a promise that such testimony will bring them favorable consideration when they come up for sentence?

I take it it is fair to assume that any man who is up for sentence before a judge hopes that he will be treated leniently. You have a right to ask yourselves was the

testimony of any one of these accomplices deliberately untruthful and given in the hope that he would be treated leniently. If you find that it was, you ought unhesitatingly to reject it.

However, if after a cautious and careful examination of a witness's testimony and his demeanor upon the witness stand, you are satisfied that he told the truth as to certain events, then there is no reason why you should not accept it as credible and act upon it accordingly. On the other hand, as I have said, (767) if you are not satisfied that the witness has given a truthful version of events, then by all means you would be justified in rejecting it. I have just instructed you with respect to factors to be taken into account in evaluating the testimony of accomplices and persons with criminal records.

A number of witnesses called by the Government are employees of the Narcotics Bureau, some of the New York City Police Department, and other governmental agencies. The fact that they are such governmental employees does not mean that you are required to give greater weight to their testimony than to that of any other witness. The credibility of all witnesses is for you and you alone to determine, taking into account the interest of the witness, the motives, and other factors which may reasonably be considered to influence and color his testimony.

If you find that any witness—and this applies to all witnesses—has wilfully testified falsely to any material fact, you may reject all of the testimony of that witness, or you may accept such part or portion as commends itself to your belief as credible.

(768) The defendants have not testified in this case. That is their absolute right, and in no respect may such failure to testify be considered by you as any evidence against them or as a basis for any presumption or infer-

ence unfavorable to them. You must not permit such fact to weigh in the slightest degree against any defendant, nor should it enter into your deliberations or discussions.

The prosecution must prove the defendants' guilt by the required degree of proof, as already explained in these instructions.

Each count must be considered separately.

The case of each defendant must also be considered separately with respect to the count or counts of the indictment in which he is named.

Thus, in the case of the conspiracy count, there are various possible verdicts. You may find all the defendants not guilty; you may find them all guilty, or you may find one or more not guilty or guilty as the case may be.

So in the instance of the three substantive counts against Rich. You may acquit him on all; you may find him guilty on all, or you may find him guilty as to one or two counts and not guilty as to the (769) third and vice versa.

The verdict in each case must be unanimous.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of such evidence and these instructions.

Under your oath as jurors, you cannot allow a consideration of the punishment which may be inflicted upon a defendant, if he is convicted, to enter into your deliberations or to influence your verdict in any way. The duty of imposing sentence rests solely with the Court.

Each juror is entitled to his or her own opinion, but each should, however, exchange views with his fellow jurors. That is the very purpose of jury deliberation: to discuss and to consider the evidence; to listen to the arguments of fellow jurors; to present your individual

views, to consult with one another, and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with his or her fellow jurors. But you should not hesitate to change an (770) opinion which after discussion with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed. Your final vote must reflect your conscientious conviction as to how the issues should be decided.

If in the course of your deliberations you require any of the exhibits, you may send out a note and they will be delivered to you.

I have in the course of these instructions when I discussed the matter of the overt acts stated that I would give you a copy containing the specific counts that you are called upon to consider.

Your oath sums up your duty and that is: without fear or favor to any man, you will well and truly try the issues between these defendants and the United States of America according to the evidence given to you in court and the laws of the United States.

You may now take the case and consider it in view of its importance and the gravity of the charge made in the indictment. It is important to the public (771) and it is also important to each of the defendants.

Now, I think that you may remain in the jurybox still without discussion as there may be some matters that counsel still want to see the Court about and, if so, we will go into the robing room.

(The following proceedings took place in the robing room between Court and counsel.)

The Court: Now with respect to the defendant Carminati.

Mr. Kove: I have one exception.

I respectfully except to that part of your Honor's charge wherein in discussing the testimony of Oglesby there was no reference made to the manner in which the testimony was given with respect to the identification of the defendant Carminati.

The Court: Any other exceptions?

Mr. Kove: No, sir.

The Court: That is a matter for the jury to determine.

Mr. Fruchtman: No exceptions.

Mr. Sweeney: No exceptions.

Mr. Fusco: I have none, but I have a request.

(772) The Court: The problem, of course, is that you never submitted any written requests in accordance with the rules, and about which matter I spoke to you heretofore.

Mr. Fusco: But here is a request that comes now after the matter is concluded, so that I could not possibly have submitted it before, as I did not know what the evidence was going to be.

The Court: What is your request?

Mr. Fusco: My request is this: if the jury disbelieves the testimony of Michael Botto as it pertains to Michael Galgano, that they must acquit.

The Court: Off the record.

(Discussion off the record.)

The Court: I will grant that request.

Mr. Fusco: Thank you, Judge.

Mr. Kove: I have another request, your Honor.

The Court: Let me say this for the record: I have asked counsel to get their requests into the Court and you have already submitted extended requests?

Mr. Kove: Yes, sir.

The Court: And I am not going to permit the making of requests now which should have been (773) submitted previously. The only thing I will permit you to put on the record is a request or requests which may relate to something contained in the instructions and which previously could not have been anticipated.

Mr. Kove: Very good, sir, and it is along that line. That is all I want.

The Court: Go ahead.

Mr. Kove: I want for the record now to show that I submitted this request to your Honor, and all the testimony was not yet in at the time.

The Court: I just stated what you can do and please go ahead and do it.

Mr. Kove: All right.

I respectfully request that the jury be instructed that if they do not believe the witness Oglesby they must acquit the defendant Carminati. That is all I have.

Mr. Londin: The Government would take exception to that, if I may be heard now.

The Court: Just hold that for a minute, as I am looking for my reference.

Mr. Kove: Yes, sir.

The Court: The Court declines to do so.

(774) Now, the reason I am going to issue further instructions with respect to the defendant Galgano is because if the testimony with reference to the events on October 16 were not in the case, I feel that I would have granted the motion to dismiss the indictment.

Mr. Fusco: Thank you.

The Court: However, I believe in the case of the defendant Carminati that the situation is entirely different as there is other evidence in the case.

Mr. Kove: I respectfully except.

(At this point the proceedings terminated in the robing room and the following proceedings took place in open court before the jury.)

The Court: Members of the jury: with respect to the defendant Galgano, if upon review of the evidence you do not believe or accept the testimony of the witness Botto who related conversations that allegedly took place in the Delmont Bar on October 16, then I instruct you under that circumstance if you do not believe Botto's story with respect to that evidence you should find the defendant Galgano not guilty.

(775) Mr. Fusco: Thank you.

Now I understand that one of the jurors has a question and I think, Mr. Juror, you had better submit it up here because it may present problems. If you do not have a piece of paper there or a pad the clerk will submit it to you.

Juror No. 5: I will write it out and hand it to the clerk.

The Court: Yes.

(Juror No. 5 hands note to clerk who in turn hands it to the Court.)

The Court: There is no evidence as to that in the case.

All right, you may proceed, Mr. Clerk. Let the marshals be sworn.

(Marshals sworn.)

The Court: Now, ladies and gentlemen of the jury, before you go inside let Juror No. 5 come up, please.

Discussion

(The Court confers with Juror No. 5 privately out of the hearing of counsel and jury.)

The Court: All right, you may go back and take your place.

(Juror No. 5 resumes his seat in jurybox.)

(776) The Court: Members of the jury: I did not quite understand the note that the juror submitted, but after conferring with him in substance the juror submitted a request for the dates of arrest of the defendants in this case. I believe there was evidence given in the case, although I am not sure, but it may have come up in the discussion in the robing room. However, irrespective of that, I believe there is evidence in the case, too, and it has some significance, of course, in the light of my charge with respect to statements made, following arrest.

Now, can counsel agree on those dates?

Mr. Kove: I think we can.

The Court: Will you please state the respective dates then?

Mr. Kove: I think at one time I did indicate the date of the arrest because of some objection that I made. However, it is September 21, the date of the arrest of my client. I believe that is correct.

The Court: Well, see if we can't get those dates in order. It ought not to be too much trouble, and in that way we can give it to the jurors right away.

(777) Mr. Sweeney: May we approach the bench on that, your Honor?

The Court: Gentlemen, please let us get started on these dates, as the jurors are waiting.

Mr. Fruchtman: As to the date of arrest of my client, William McKenney, it is September 21.

Discussion

Mr. Kove: And the same as to my client, your Honor, Anthony Carminati.

Mr. Fusco: And as to my client, your Honor, Michael Galgano, that is November 19.

The Court: All right. Now do you want to come up, Mr. Sweeney?

Mr. Sweeney: Yes, sir, your Honor, I do.

(Discussion between Court and Mr. Sweeney at bench, without the hearing of the jury, and not reported.)

The Court: All right. What is the date, Mr. Sweeney? Will you please state it for the record and so the jurors can hear it?

Mr. Sweeney: August 24, your Honor.

Mr. Lankenau: That is correct, your Honor.

The Court: Now, ladies and gentlemen, before you start your deliberations I have another (778) task. There have been 14 jurors in the case and you know, of course, that we selected two alternates not knowing how long the case would take, and with the prospect of an extended trial we always select additional jurors.

(Addressing alternate jurors) You have been very devoted in your duties here as have all the other jurors. I do not know whether at this time where we are about to discharge you that you have a sense of frustration or a sense of relief that you are not going inside. In any event, I want each of you to feel that your readiness to sit longer than the usual hours, your participation in the trial, and the attention that you have given is as much a part in the performance of your duty as a juror as if you were now to go inside and deliberate. However, the law does not permit the 14 jurors to go in, only the first 12. So under those circumstances, why, we will have to excuse you.

Discussion

(Alternate jurors excused and the jury started their deliberations at 5.05 p.m.)

(The following proceedings took place in the robing room.)

(779) Mr. Lankenau: With respect to the request of Mr. Kove that in the event the jury disbelieved Oglesby's testimony as to the conversations alleged to have taken place between Oglesby and the defendant Carminati, that then the jury should find the defendant Carminati not guilty, it is the position of the Government, your Honor, that unless you held that such request was untimely, that as a matter of substance I believe the defendant is entitled to hat request, because the only other evidence against Carminati in the case is the meeting with Russano on August 22 and subsequently the meeting which occurred between the Russanos and Rich and the defendant's connection which ensued thereafter, so that as to the evidence of the events of August 22 standing alone, I doubt whether your Honor would permit it to go to the jury.

The Court: Any objection to calling the jury back now?

Mr. Kove: None whatsoever.

The Court: Call the jury back. I am not going to allow the question of untimeliness in submitting the request to stand in the way.

(At this point the discussion in the robing room terminated and at 5.18 p.m. the jury returned to the courtroom and the following took place.)

(780) The Court: I am sorry, ladies and gentlemen, but there is one instruction I overlooked at the time of my main charge that I desire to give you, and that is with respect to the defendant Carminati, as to whom the principal testimony was given by the witness Oglesby, and it made refer-

ence to four different incidents. If at the conclusion of your review of all the evidence you disbelieve Oglesby's testimony, that is, disbelieve in substance his statements made with respect to the defendant Carminati, then I will instruct you to find the defendant Carminati not guilty.

Does that meet your requirement, Mr. Kove?

Mr. Kove: Yes, your Honor.

The Court: You may resume your deliberations.

(At 5.20 p.m. the jury resumed their deliberations, and at 5.45 p.m. the following proceedings took place in the robing room.)

The Court: I have a note from the jury which reads as follows:

> "We would like a copy of the minutes. If the minutes are denied us can we find out if an agent was present, or anyone else, when Galgano made the statement (Botto's testimony) (781) 'My stuff was good when I gave it to Russano. Whatever he does with it later I don't know.'"

I am definitely opposed to giving them a full set of the minutes, but I am prepared to answer their question.

My recollection of the testimony is that there is no evidence in the case to indicate that anybody was present other than Miss Bridges, Boto and Galgano.

Does that accord with your recollection, Mr. Fusco?

Mr. Fusco: Yes.

The Court: Mr. Lankenau?

Mr. Lankenau: Your Honor, subsequently Carminati was present. Botto testified that he met Carminati through Galgano.

Mr. Kove: That was stricken.

Discussion

The Court: Advise me where there is a claim made by anybody that somebody else was present at the time of that conversation.

Mr. Kove: I don't even recall whether it was said at that particular conversation.

Mr. Lankenau: Your Honor, I am simply stating that the conversation was stricken out but (782) the fact of the introduction was not stricken out.

The Court: Show me where.

Mr. Lankenau: Right here, your Honor (indicating).

The Court: He said 15 minutes later.

Mr. Lankenau: That is correct. I simply said at the time of the first conversation with Galgano that Carminati was not present, but Carminati was present in the bar that afternoon.

The Court: Why do we have to get into that? Isn't the question whether or not somebody else was present when the conversation took place? Is there any question that nobody was present at the time? They didn't ask whether anyone was present subsequently.

Now, the Court is disposed to send the following note back to the jury unless counsel feel that they would like the jury brought in and instructed:

Members of the jury: there is no testimony in the case that anybody other than Miss Martha Bridges, Michael Botto and Michael Galgano were present at the time of the conversation related by Botto on October 16, 1956.

(783) Do you have any objection to that?

Mr. Lankenau: Your Honor, I feel that there was testimony that Carminati was introduced to Botto by Galgano that very afternoon.

The Court: You show me in the minutes where there is any testimony that an agent was present or anyone else

when Galgano made the statement—and I am now still quoting from the note sent by the jury—"(Botto's testimony) 'My stuff was good when I gave it to Russano. Whatever he does with it later I don't know.'"

If you will show it to me in the record I will send it in to the jury.

Mr. Lankenau: There was no one else present at that time.

The Court: That is what the jury only asked for, and I think it is very unfair to have it related to other testimony that the jury did not ask for.

Mr. Lankenau: I had no such intention.

The Court: I asked you to find out specifically if anybody else was present. The jury didn't ask for anything else.

Do you have any objection to my sending that (784) note in?

Mr. Lankenau: No, your Honor.

The Court: Do you have any objection to sending the note in as I have indicated?

Mr. Fusco: No.

The Court: Do you have any objection to the note as I have summarized the testimony?

Mr. Fusco: No, I think it is very fair.

The Court: I am not asking for your judgment as to whether or not it is fair; I am simply asking either one of you to find out if there is anything in the record that will warrant a different answer to the jury than the one I am about to send in.

Mr. Fusco: No, sir.

Mr. Lankenau: No, sir.

The Court: It may be sent in then.

(At this point the conference in the robing room terminated.)

Discussion

(The jury went to dinner at 7.00 p.m. escorted by the marshals and returned to the juryroom and resumed their deliberations at approximately 8.10 p. m.)

(At 8.45 p.m. the jury returned to the courtroom and the following proceedings took place.)

(785) The Court: Members of the jury, I have your note which has a number of requests. The first one is, "May we have the minutes?"

Well, these minutes run I should judge to about four or five hundred pages and I frankly can see no purpose in giving you the minutes of the entire trial.

You go back into the juryroom and decide what testimony you want read, and it does not make any difference if you want it all read, or if you want a specific portion read, as I will arrange, of course, to have the minutes read to you, but I see no purpose in handing you four or five hundred pages of minutes to run through.

Will you please go back into your juryroom and decide what portion you want read and then it will be read.

You also have other requests here, "Bankers Trust," and from it is not clear to me whether you want Exhibit 33 which has to do with the 12 envelopes, or if you want Exhibits 7, 18 and 33.

The Foreman: Yes, sir, all three.

The Court: Then those three exhibits will be handed to you.

(786) And then you also ask for the pictures of crash, and those exhibits will be submitted to you.

Again, with respect to the minutes or any portion of the testimony that you want read, please decide what you to you.

Now, have you shown defense counsel all the exhibits? want read and without restriction it will be, as I say, read

Mr. Londin: Yes, sir. Please hand them to the foreman.

(At this point the proceedings in the courtroom in the presence of the jury terminated and the jury resumed their deliberations at 8.50 p.m.)

(At 9.05 p.m. the following proceedings took place in the robing room.)

The Court: I have this note from the jury and I wanted to call you gentlemen into the robing room so that you may hear what they ask for, and the note reads as follows:

> "We only want Agent Dugan's testimony concerning Carminati, also testimony given when Galgano allegedly made the statement 'When I give the stuff to Russano it is good quality. What happens after that I don't know.' (787) Who was present at this time? Also testimony concerning seven quarters one night and three-quarters another night. What do those guys mean."

Now, with respect to the first question or request dealing with Agent Dugan's concerning Carminati, it so happens that I had asked the court reporter to get that up for me and I have that testimony here. Now, if you would prefer to have the reporter read it from his notes, why, we will do it, but it so happens that that particular part has already been transcribed.

Mr. Kove: No, sir, I do not see any reason why we should have the reporter read it from his notes when the transcript is readily available.

The Court: All right.

Then that is this part here with respect to Dugan's testimony on August 22 (indicating).

Mr. Kove: Yes, sir.

Discussion

The Court: And now with respect to the testimony given when Galgano allegedly made the statement "When I give the stuff to Russano it is good quality. What happens after that I don't know." I find this starts on page 67 or 65, or we will start (788) at page 65, and then we will read the cross.

Mr. Fusco: I have the transcript here, your Honor, and on page 222, does that accord with your view also, Mr. Londin?

Mr. Londin: I have not come to it as yet.

The Court: There is just one reference there, and then the next time I see it is at page 244.

Mr. Londin: Page 222 is where I see it.

Mr. Fusco: Yes, right about the center of the page at 222.

The Court: Then you will read 221 and 222, and then the testimony concerning the seven quarters that was given by Oglesby, and that is at page 40, and unless there is some other place that you gentlemen can point out where other testimony appears, that is what we will have read.

(At 9.25 p.m. the jury returned to the courtroom and the following proceedings took place.)

The Court: Now, members of the jury, I have your note in which you ask as follows:

> "We only want Agent Dugan's testimony concerning Carminati, also testimony given when Galgano allegedly made the statement (789) 'When I give the stuff to Russano it is good quality. What happens after that I don't know.' Who was present this time? Also testimony concerning seven quarters one night and three quarters another night. What do those guys mean?"

Discussion

Now, this testimony of Agent Dugan we will take first and that, as I recall it, concerns his testimony of when he stated he had certain premises under surveillance on August 22, 1956.

I will ask the court reporter to read that portion to you first.

(Testimony read.)

The Court: Now, the balance of that testimony relates to Agent Dugan's statement that he followed the Russanos to 180th Street, went into the building, then came down, they got to La Fontaine Avenue, and now if you want that read to you that is the balance of it.

A Juror: Yes.

(Record read.)

The Court: That is the portion that relates to Carminati.

Now, the next item you ask for is with respect (790) to the statement "When I give the stuff to Russano it is good quality. What happens after that I don't know.'" There are two items on that; one was given on the direct examination of the witness Botto and on cross. We will have the direct examination read first and then the cross.

I think, Mr. Reporter, you will find the direct there at page 65, and then the cross-examination.

(Record read.)

The Court: You do not want the objections read, do you?

Mr. Fusco: No, your Honor, I do not.

The Court: The cross-examination on the same subject appears at pages 221 and 222, and that is the portion which has just been read.

Mr. Fusco: Yes.

The Court: I think that is about all there was on that.

Discussion

Now you want the testimony with respect to the seven quarters and so on, and that is in the witness Oglesby's testimony, Mr. Reporter, and I think you will find that at page 40.

(Record read.)

(791) The Court: Then there is cross-examination if you want that read, too.

Jurors: No.

The Court: Is that sufficient now?

The Foreman: That is sufficient.

The Court: That is sufficient?

Jurors: Yes.

The Court: All right, then, you may return and resume your deliberations.

(At 9.45 p.m. the jury resumed their deliberations.)

(At 10.00 p.m. the following proceedings took place in the Court's chambers.)

The Court: All right.

Mr. Fusco: Your Honor, only after your Honor had the court reporter read certain portions of the testimony, and you will recall that one of the questions that was asked was as to who was present during the conversation that was had between Michael Botto and Michael Galgano, and even though that was previously asked and answered, it still was asked again but that was not answered this last time when they were brought back into the courtroom.

The Court: I think you are correct, that (792) that was part of the question, but I also think that the record should indicate that your request now is made at least ten if not fifteen minutes after I sent the jury back into the jury-room. I read to the members of the jury the testimony that they had requested and I believe I specifically at the

end of the reading asked if there was anything further they wanted, or whether that was sufficient and the answer was in the affirmative.

Now, since at this point almost fifteen minutes have gone by I see no purpose in recalling the jury, especially so since you have been fair enough to indicate, Mr. Fusco, that this very question was asked I believe in the first note that came out of the juryroom and was answered at that time. I am sure that if the jury wanted that answered they would have had no hesitancy in so requesting, and since this period of time has elapsed since the furnishing of the information to them, and in view of the fact that the matter was not called to my attention at the time the jury was present in the courtroom, I do not feel that there is any basis for recalling them.

Mr. Fusco: Your Honor has been most fair, (793) but may I except to your Honor's ruling on behalf of my client. I have no quarrel with that.

The Court: I think it is your duty to do that.

Mr. Fusco: Thank you.

(At this point the discussion in the Court's chambers terminated and the following proceedings took place at 10.10 p.m., when the jury returned to the courtroom.)

The Clerk: Members of the jury, please answer as your names are called.

(Roll of jurors called.)

The Clerk: Mr. Foreman, has the jury reached a verdict?

The Foreman: It has.

The Clerk: How say you?

The Foreman: We, the jury, find the defendant Frank Rich guilty on counts 3, 4, 8 and 14.

Verdict

We find the defendant Michael Galgano guilty on count 14.

We find the defendant William McKenney, Jr. guilty on count 14.

And we find the defendant Tony Carminati guilty on count 14.

(794) The Clerk: Members of the jury, listen to your verdict as it stands recorded.

You say you find the defendant Rich guilty on counts 3, 4, 8 and 14; the defendant Michael Galgano guilty on count 14; the defendant William McKenney, Jr. guilty on count 14 and the defendant Tony Carminati guilty on count 14?

Jurors: Yes.

The Clerk: And so say all of you?

Jurors: We do, yes.

Mr. Kove: May we have a poll of the jurors, your Honor?

The Court: Yes.

(Thereupon the jury was polled by the clerk and each juror individually stated the above to be his or her verdict.)

Mr. Kove: If your Honor please, I respectfully move now that the verdict be set aside with respect to the defendant Anthony Carminati as being against the law and against the weight of the evidence in this case.

The Court: Motion denied.

Mr. Fruchtman: The defendant William McKenney, Jr., your Honor, I move the same, that the (795) verdict be set aside as contrary to law and as against the weight of the evidence.

The Court: Motion denied.

Verdict

Mr. Sweeney: On behalf of the defendant Frank Rich I move to set aside the verdict on the ground that it is against the law, contrary to law and against the weight of the evidence.

The Court: Motion denied.

Mr. Fusco: If your Honor please, on behalf of Michael Galgano I move to set the verdict aside as being contrary to the evidence and contrary to law.

The Court: Motion denied.

Mr. Fusco: I respectfully except.

* * * * *

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SUPREME COURT, U.S.

No. 496

FILED
SEP 23 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

ANTHONY CARMINATI, WILLIAM McKENNEY, JR., FRANK RICH and MICHAEL GALGANO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York
Attorney for the United States of America.

JEROME J. LONDIN,
ROBERT KIRTLAND,
Assistant United States Attorneys,
Of Counsel.

FILED
SEP 23 1957
JOHN T. FEY, Clerk

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Indictment

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C-151-226

• • • •

(3)

THIRD COUNT

The Grand Jury further charges:

1. On or about the 23rd day of June, 1956 in the Southern District of New York,

FRANK RICH and
DAVID SHACKELFORD

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug; to wit,

approximately ½ ounce of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited. (Title 21, Sections 173 and 174, United States Code).

(4)

FOURTH COUNT

The Grand Jury further charges:

1. On or about the 28th day of June, 1956 in the Southern District of New York,

FRANK RICH

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug; to wit,

approximately 1 ounce of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited. (Title 21, Sections 173 and 174, United States Code).

• • • •

(8)

EIGHTH COUNT

The Grand Jury further charges:

On or about the 22nd day of August, 1956 in the Southern District of New York,

FRANK RICH

the defendant, unlawfully, wilfully and knowingly did

receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug; to wit,

approximately 1 ounce of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is prohibited. (Sections 173 and 174, Title 21, United States Code).

• • • •

[For the Fourteenth Count see Galgano App. pp. 17a-23a]

Excerpts from Testimony

DAVID OGELSBY—for Government—Direct

* * * *

(158)

Q. Now, in early or mid-October of 1955, you were in John's Bar at 180th Street and Third Avenue? A. Yes.

Q. And you met Ralph and Sal? (159) A. Yes.

Q. What happened? A. Well, we were standing up in the corner, up at the end of the bar.

Q. Who are "we"? A. Sal, Ralph and myself.

Q. Was anyone else there? A. Well, a short time later three men came in.

Q. Do you know or did you know those men? A. No, I did not.

Q. What happened? A. Well, they walked back in the middle of the bar and they were standing there for a minute and then Ralph walked over to them.

Q. What did Ralph say to them?

Mr. Fusco: I object to this unless the three men can be identified, your Honor.

Mr. Londin: Your Honor——

Mr. Fusco: Please let me finish.

Mr. Londin: I am sorry.

Mr. Fusco: Unless the three men can be identified as one of the three alleged co-conspirators mentioned in the indictment.

Mr. Londin: The indictment also refers to (160) other co-conspirators to the grand jurors unknown, your Honor, and these are such.

Mr. Fusco: I object, if your Honor pleases.

The Court: Overruled.

Mr. Fusco: I respectfully except.

The Court: Mr. Fusco, you do not have to take an exception. You have your exception noted automatically under the rules of this court.

Mr. Fusco: Thank you very much.

Q. Mr. Ogelsby, what did Ralph say to these men and what did they say to him? A. Well, I don't know the conversation that they had, but I heard part of it, and they were talking about three pieces.

Mr. Fusco: I object to this. Who was talking about the three pieces?

Q. Who was talking about the three pieces? A. Ralph was talking about the three pieces and then——

Q. What is a piece?

Mr. Fusco: I object to this, if your Honor pleases.

Mr. Londin: If your Honor pleases——

The Court: I will allow him to answer.

(161)

Q. What is a piece?

The Court: Does a piece have a special meaning in the purchase or sale of narcotics?

The Witness: Yes, sir, it means an ounce of narcotics.

Q. And what happened after this conversation about the pieces which you heard? A. Well—well, all of us were staying up there and then Ralph went out and told them that he would have to make a call.

Q. Wait a minute. Ralph told who? A. Ralph spoke to the three men and said to the three men that he would have to make a phone call and he left the bar and was gone for a few minutes and then he came back.

And immediately after he was back in the bar, then another fellow came in behind him, and walked over to the men and then they talked for a few minutes and then the three men, Ralph, and the other fellow, left.

Q. Now, that night did you make any purchase from Ralph or Sal? A. I got an ounce.

Mr. Kove: Objected to, your Honor. (162) This is all leading.

The Court: Yes, please don't lead.

Q. What else happened that night, Mr. Oglesby? A. Well, I made a purchase. That is what I went up there for.

Q. What did you purchase? A. What is that?

Q. You said you went up there for a purchase. A. Yes.

Q. And what did you purchase? A. An ounce of heroin.

Q. And how much did you pay for it? A. The same $600.

The Court: Aren't you going to fix the place or from whom this purchase was made?

Mr. Londin: Yes, sir.

Q. From whom did you make this purchase and where? A. I think, I am not sure, but I think we went around on a street behind a school up there at 180th Street, but I am not too familiar with that place.

Q. Who went up there? A. Ralph and Sal, and I got it from Ralph. Ralph got out of the car, walked across the school yard, came back and then handed me the package.

(163)

Q. When were you next in John's Bar?

Mr. Fusco: That is certainly leading, your Honor, about John's Bar.

The Court: After this occasion were you ever in the bar again?

The Witness: Yes, I was there several nights, several days later.

Q. When were you there again? A. Several days later I was there again.

Q. What happened? A. Well, I went up to buy heroin and I met Ralph and Sal there, and while I am there——

Q. Was anyone else in the bar? A. The same three men.

Q. Whom you had seen before? A. The same three men that I had seen there before.

Q. I beg your pardon? A. The same three fellows that I had seen the previous time that they were there.

Q. And did you hear any of their conversation with Ralph and Sal? A. I don't remember, but one of the three men——

Q. What did you hear them say or do? (164) A. Well, I saw him take several quarters, saw them take several quarters and then——

Q. Who do you mean by that when you say you saw them? A. One of the three men, he took several or some quarters out of his pockets, and he threw seven up on the bar.

Q. You mean he threw seven quarters on the bar? A. Yes.

Q. Was anything said then? A. Well, I mean I don't know just what it was.

Q. If you heard it, say it. A. I heard that there was something said like Ming Gay to this fellow——

The Court: Something like ming gay?

The Witness: Yes.

Q. Something like ming gay? A. Like ming gay.

Q. Yes. A. But I couldn't hear it too good.

Q. You couldn't hear it too clearly? A. I couldn't hear it too clearly.

Q. What happened then? A. And one guy says "Gee, ming gay, three last night or the other night and seven tonight. What is (165) happening with these guys?"

Q. Who said that? A. One of the men who came into the bar.

Q. Let me see if I understand that. One of the three men who was with Ralph and Sal took seven quarters— A. Yes.

Q. —and threw them on the bar? A. Yes.

Q. Seven distinct quarters? A. Yes.

Q. And after he threw those seven quarters on the bar, did Ralph or Sal do anything? A. He made a call before. He didn't do anything right then and there, no.

Q. Who had made a call? A. Ralph had made a call.

Q. Was this before or after one of the three men threw the seven quarters on the bar? A. It was shortly before he threw the seven quarters on the bar.

Q. One of the three men threw seven quarters on the bar? A. Yes.

Q. And then you heard different pieces of the (166) conversation and you are not too clear about what it was? A. Yes.

Q. And then what happened? A. Then this other fellow, this other fellow when they came into the bar he said "Ming gay, three the other night, seven tonight. What is happening to those guys?"

Q. "Three the other night, seven tonight, what is happening to those guys?" A. Yes.

Q. Who said that? A. The fellow who came in after Ralph.

Q. Do you know the man's name? A. I didn't know it at that time.

Q. Did you subsequently learn it?

Mr. Sweeney: I move to strike that out.

Q. Did you subsequently learn this man's name? A. They called him Tony.

Q. Just Tony? A. He said Little Tony.

Q. And do you see Little Tony in court now. Will you please look around? A. All right.

(167)

Q. I think you may have to stand. A. I see a man resembling him.

Q. Where is that man? A. With the gray suit on the end over there (indicating).

Mr. Londin: May the record indicate that the witness has pointed to the defendant Anthony Carminati.

Mr. Kove: Now, if your Honor pleases, may the record indicate that the witness testified that he sees a man that resembles the man that he says is Little Tony.

The Court: That is right.

Q. Now, you say Little Tony said something about "Three the night before and seven tonight? What is happening to those guys?" A. That is right.

Q. And what happened then? A. He engaged in a conversation for a few minutes and then they left the bar.

Q. Did you have any transaction with Ralph and Sal? A. When he came back he brought back an ounce of heroin that I went up there for.

Q. And how much did you pay him? A. $600.

Q. Now, did there come a time when you discussed (168) with Ralph and Sal the quality of heroin? A. Yes—well, he told me that he had been——

Q. Who is "he"? A. Well, both of them in fact were talking about the stuff that they were getting which wasn't so good and they wanted to get something better.

Q. Now, did they tell you where they were getting their heroin from? A. I don't understand what you mean.

Q. Did Ralph and Sal tell you where they were getting their heroin from? A. From what place or from whom, do you mean?

Q. From whom? A. Well, he mentioned the fact——

Q. Who mentioned? A. Ralph like said that he was tired of taking the abuse that Tony had given him and that he was looking for another connection.

Q. And did he also complain about the quality of the heroin that Tony was giving him?

Mr. Kove: Objected to as leading, your Honor.

A. He said it wasn't up-to-date.

The Court: Yes. Please don't lead.

Q. To the best of your recollection will you (169) state in full what Ralph and Sal said to you on that occasion? A. Well, they said that they were tired of taking the abuse that Tony was giving them and that the stuff wasn't so good.

* * * *

(170)

Q. Did there come a time when you saw Little Tony again? A. Well, that was one occasion that I remember.

Q. Well, did you call Ralph and Sal at some time after this? A. Pardon?

Q. After this conversation with Ralph and Sal did you call them again? A. Yes, I called them again.

Q. Will you tell the Court and jury what you said to them and what they said to you?

The Court: Fix the time and the place.

Q. Approximately how soon after this did you call them again? (171) A. Well, a few weeks, I guess.

The Court: Can you fix the time?

The Witness: I am trying.

The Court: As to when it was approximately.

The Witness: I am trying now to do that.

The Court: We are not asking for exact dates, but approximately when did you see them again?

The Witness: It must have been around in November, I guess.

The Court: November, 1955?

The Witness: November, 1955.

The Court: And where did you see them?

The Witness: I saw them at a luncheonette at Park Avenue and Tremont.

Q. And did you have a conversation with them? A. Yes, well, yes. I wanted to get an ounce of heroin from them and we were sitting—I told them what I wanted, so they said that I had to wait for a while.

Q. Who had to wait? A. Ralph and Sal were sitting in there for awhile and then someone else came in, two men.

Q. Who were they? A. The fellow called Tony and another one called (172) Angelo.

Q. And did Ralph have a conversation with Tony and Angelo? A. He did.

Q. Will you state what that conversation was? A. I didn't know who they were, see, because I really didn't hear, but at the finish of it Ralph came over to me and said that I have to wait until later because he could not do it.

Q. Did he tell you what you would have to wait for? A. He told me that I would have to wait until later because he couldn't get the heroin for me at that time.

Q. And what happened then? A. So he told me he had to get off—I think it was Westchester, and he would call me later that night.

Q. And did he leave then? A. Well, we all left and went out of the luncheonette.

Q. Did you all leave in one group or did you leave separately? A. I walked out first, tried to get a cab, and the other four walked out afterwards.

(173)

Q. Did you see what they did after they walked out? A. Well, there was a car parked on Park Avenue, and they apparently got in the car, because when the cab was being pulled up to the traffic light, when the cab that I was in was being pulled up at the traffic light, then I saw that they were in the car.

Q. But you did not see them get in? A. No.

The Court: Do you see either Tony or Angelo in this courtroom?

The Witness: Only the one I know as Tony.

The Court: I say, do you see either Tony or Angelo in this courtroom?

The Witness: Yes, I see Tony.

The Court: Point Tony out.

The Witness: The man with the gray suit on.

The Court: And that is the man that you say you saw on that occasion?

The Witness: Yes, to the best of my recollection.

Mr. Londin: May the record indicate that the witness has pointed to the defendant Carminati, your Honor?

Mr. Kove: May I have that answer read, your Honor?

(174)

The Court: Yes.

(Answer read.)

Mr. Londin: May the record indicate that the witness has pointed to the defendant Anthony Carminati?

Q. Now, after you left this group of four and went out of the restaurant to go in the car, did you then hear from Ralph after that? A. Well, he told me before he left that he would call me when he would get back.

So about one o'clock I got his call and he told me to meet him at 166th Street and Broadway.

Q. And did you meet him there? A. I did.

Q. And what happened then? A. We got in the car and we drove down Broadway.

Q. In whose car? A. Ralph's car, the car that he was driving, and we struck up a little conversation.

Q. And what did Ralph say to you and you to him? A. Well, he was telling me about the trip that he was taking up in Westchester.

He said that is where the big boys live. And he said that when you are in that crowd you are (175) really living, he could have been in it but that he had blown fifty-seven thousand shortly before.

Q. What then happened? A. Well, I told him—he asked me what I wanted. I told him then that I wanted to get the two ounces that I previously told him about.

Q. Two ounces of what? A. Heroin.

Q. And did you get the two ounces of heroin from him? A. Yes.

Q. How much did you pay him? A. I gave him $1100.

• • • •

(177)

Q. Did there later come a time when you had a discussion with Ralph about cut stuff? A. Yes, there did.

Q. Will you please tell the Court and the jury when and where this conversation took place? A. That must have been around about December. I don't remember just about when.

Q. December of what year? A. 1955.

Q. What happened? A. And I called him up and told him that I wanted an ounce.

Q. Called who up? A. Called Ralph up. I told him that I wanted an ounce of heroin. And he told me to come up and meet him at the Cosmo. And I went up to the Cosmo and was sitting at the counter there, and then Sal came in, sat down, we had coffee, and then he was telling me that I would have to take seven ounces.

Q. Who is he? A. Ralph.

Q. Yes: A. That I would have to take seven ounces of heroin.

(178)

The Court: Seven or several?

The Witness: Seven. So I told him I didn't want it.

Q. He said you would have to take seven ounces of what? A. Cut heroin. I told him I didn't want it. So he told me he would see what he could do.

So he made a phone call and then after a little while this man, another fellow came in, and walked to the back of the restaurant.

Q. Who is this other fellow? A. The fellow I know as Tony. And he sat at the rear table, and we got up to the counter, got up from the counter and walked back.

Q. Who is "we"? A. Ralph, Sal and myself, and we sat at the rear table and talked. They were talking, rather, and so after a while this Tony looked at me and he said, "I am sorry, big boy, but you will have to take seven ounces of cut stuff, which is the best we can do," something to that effect.

I told him I didn't want it because it won't serve the purpose.

So we talked backward and forwards. And so (179) Ralph said, "Maybe we can borrow an ounce from somebody." I don't remember the name he used.

So he told me to meet him in a little while, about an hour or so, down at Tremont Avenue, and then——

Q. Before you go to that, did anyone else say anything at this time when Ralph or Sal said, "Why don't we try to borrow an ounce from him"? Did anyone else say anything? A. Not as I remember.

Q. Then you were told to meet Ralph an hour later? A. About an hour or so later.

Q. And did you meet him? A. I met him.

Q. Where? A. Tremont and Park.

Q. What happened? A. Well, I gave him the money and he gave me the ounce of heroin.

Q. How much did you give him? A. $600.

Q. When was the next time you met Ralph?

The Court: Are you going to ask him whether or not he knows the man Tony?

Mr. Londin: The witness has referred to the man Tony that he met before, has he not, your Honor?

(180)

The Court: I don't think so, not one bit, and I am not going to permit the jury to speculate on that.

Do you see the man who was present on that occasion and whom you described? Do you see him in the courtroom?

The Witness: The same fellow with the gray suit.

Mr. Londin: May the record indicate that the witness has referred to the defendant Anthony Carminati?

Q. Did there come a time when you again met Ralph or Sal? A. Yes, I met them several times again, I guess.

Q. When was the next time? A. I guess it was probably a week or so later.

Q. Where did you meet them and for what did you meet? A. Well, probably in John's Bar.

Q. And what did you buy? A. An ounce of heroin, $600.

Q. Now, did there come a time when you tried to get heroin without paying for it? A. Once.

Q. When did that take place? (181) A. I guess it must have been around January, I guess, or February.

Q. Of what year? A. 1955—1956 it would have been.

Q. Where did this take place? A. Well, the Cosmo Restaurant.

Q. Who was there? A. When I got up there Ralph and Sal were there.

Q. What did you say to them and what did they say to you? A. I told them that I wanted to get two ounces of heroin on consignment. So he told me—he says, "I don't know."

Q. Who told you that? A. Ralph told me.

Q. Yes? A. He says, "I don't know what I can do about it but I will see."

Q. And then what did Ralph do? A. He made a phone call.

Q. And what happened after Ralph made the phone call? A. Well, he came back inside and we had coffee and talked for a while and shortly afterwards another man came in.

(182)

Q. Who was that other man? A. The fellow I knew as Tony.

Q. Do you see Tony in court? A. The same one that I referred to before.

Q. Is that the man in the gray suit sitting in this courtroom over there (indicating)? A. That is right.

Mr. Londin: May the record indicate that the witness has referred to the defendant Anthony Carminati.

Q. Now, after Tony Carminati came in, what happened? A. He went to the back table first and sat down, and then we got up and went to the table and spoke to him.

Q. Who is "we"? A. Ralph, Sal and myself, and we had a little chat and talked back and forth to each other, you know.

Q. Did Ralph say anything? A. Well, we all was talking. He says "Tony,"—I mean they were talking.

Q. Who is "they"? A. That is Tony and Ralph were talking together, just about general things, and after a while I told them (183) what I wanted, that I wanted two ounces of heroin on consignment. So Tony looks up, and he says—he tells Ralph "That don't make sense," he says, "you will only be putting yourself in the middle."

Q. Tony said that to Ralph? A. Tony said that to Ralph.

Q. And after you said you wanted two pieces on consignment? A. That is right.

Q. What happened? A. So Ralph gets up and he says, "I am sorry. Nothing can be done. I can't go anything."

Q. And did you get the two ounces on consignment? A. No, I did not.

* * * * *

(198)

Q. On this occasion did you ask Sal for narcotics? A. Yes, I told him that I wanted some, told him that I wanted some heroin. And he told me that he had to take it easy, he had to let it cool for a while, that he had to cool it for a while, and he would see.

There was another fellow sitting there with him on his right near the window, and he says, "From now on," he says, "Rocky will have to take care of things. He will be taking care of things," because he will have to cool it.

Q. And was that Rocky with him at the time he said it? (199) A. He was sitting at the table with him.

Q. And do you see Rocky in court here? A. He is sitting at the right of the fellow with the gray suit.

Mr. Londin: May the record indicate that the witness has identified the defendant William McKenney, your Honor?

Please mark this as Government's Exhibit 4 for identification.

(Marked Government's Exhibit 4 for identification.)

Q. I show you Government's Exhibit 4 for identification. Will you examine this photograph, please, and tell me whether you have ever seen that person before? A. I may have seen him, but I don't remember.

Q. You don't remember? A. No.

Q. Now, did there come a time when agent Johnson visited you, or when in agent Johnson's presence you phoned the Russanos? A. Yes.

Q. When did this take place? A. I think this was also in August.

Q. And what time, do you recall? Which part (200) of August would it be, and what time of the day? A. The latter part of August.

Q. And about what time of the day was it, if you know? A. It was in the afternoon.

Q. And what happened? A. Well, he wanted to make another purchase.

Q. Who is "he"? A. Agent Johnson wanted to make another buy.

Q. Yes. A. So he told me to call up the Russanos again. I did.

Q. And what happened? A. And I spoke to Ralph and Ralph answered the phone. And I told him I wanted to see him. So he says, "I won't be able to make it." And he told me how the transaction would have to be carried out. He said he would send Rocky. So at the time something happened and the deal didn't go through. The agents could not see him or could not get him, something like that. So anyway I went up to meet Rocky at 176th Street and Broadway.

Q. And during the course of this conversation did you say anything yourself to Ralph Russano? Do you recall anything else that was said in the conversa- (201) tion? A. I don't remember.

Q. You then went up to meet Rocky, is that it? A. Yes.

Q. What happened? A. Well, I told him that——

The Court: Pardon me. Where did you meet him?

The Witness: I think it was at 176th Street and Broadway or 175th Street. I went up to meet Rocky and I told him that my friend, that they had bought some other stuff from somebody else and got his money all tied up, and would have to wait until the next day or so.

Q. Did Rocky say anything to you before this when you met Rocky up at 176th Street or 175th Street and Broadway? A. That is about all we just said.

Mr. Fusco: I am sorry but I don't hear him.

The Witness: We just greeted each other. That is about all that I remember.

Q. Did Rocky say what he was meeting you for?

Mr. Kove: I object to that as leading and suggestive.

The Court: Yes, please don't lead.

Mr. Londin: I am sorry, your Honor.

(202)

The Court: Did you tell the entire conversation?

The Witness: Well, that is about all of it I mean, and I was given to understand——

The Court: No, not what you were given to understand. What was said either by you or by Rocky on that occasion?

The Witness: That is about all that I remember.

Q. Had you ever met Rocky on any occasion other than the times you have referred to? A. Not that I remember.

The Court: You did not meet Rocky the next day then, did you?

The Witness: No.

The Court: You say you did meet him as a result of your telephone conversations with Ralph?

The Witness: Yes.

The Court: And Ralph said that he was not in a position to carry through the transaction but Rocky would be there?

David Ogelsby—for Government—By the Court

The Witness: Yes, sir.

The Court: And you did meet him as arranged?

The Witness: I did.

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DAVID OGELSBY—for Government—Cross

(205)

Q. Mr. Oglesby, on your direct testimony this morning you pointed at the gentleman sitting there with the gray suit and you testified that the man you spoke to on that first time and who was introduced to you as Little Tony resembled this man, is that correct? A. Yes.

Q. And is that still your testimony? A. That is right.

Q. And is it your testimony that on all the other occasions when you say you met him that it was this man who resembled the man you met? A. That is right.

Q. Did you see the same man on all occasions? A. On the ones that I mentioned that he was involved in, yes.

Q. The same man? A. Yes.

Q. Now, when you said this man resembled him, is that because you are not quite sure that it was the same man? A. Well, according to my memory it is the best I can say was that he looks like him, looks exactly (206) like him.

Q. Looks like him?

The Court: Looks exactly like him, he said.

Mr. Kove: Yes.

Q. Are you sure that this is the man that you saw on those occasions? A. As far as I know, yes.

Q. There is no doubt in your mind about that, is that right? A. That is right.

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(211)

Q. The charge is still pending? A. Yes.

Q. You pleaded not guilty to that charge? A. No.

Q. What did you plead? A. Guilty.

Q. What did you plead guilty to? A. Possession of narcotics.

Q. And when did you plead guilty to that charge? A. I think it was in July.

Q. July of this year? A. Yes.

Q. Is that correct? A. Yes.

Q. Were you sentenced after you pleaded guilty? A. No, I was not sentenced.

Q. You have not as yet been sentenced? A. No, it is still pending.

Q. And was it after that that you met Agents Johnson, Dugan and Cox? A. Yes.

Q. Is that right? A. That is correct.

Q. Now, when you first met these gentlemen, (212) where was it? A. Where was it?

Q. Yes. A. At my house.

Q. At your house? A. Yes.

Q. Where is that? A. Up at——

Mr. Londin: If your Honor please, I believe the witness has a natural reluctance to discuss the place where his family lives.

Mr. Kove: I don't doubt that he has a natural reluctance, but at the same time——

Mr. Londin: I am sorry, withdrawn. I am just wondering whether it is relevant to the cross-examination.

The Court: Well, unless I question the witness myself, and I will do it in the absence of the jury.

Mr. Kove: I think I know what Mr. Londin has in mind, your Honor.

Mr. Londin: I will withdraw my remarks, your Honor, because I have nothing in particular in mind.

The Court: It does not make any difference (213) where his house is located, does it?

Mr. Kove: No, except I want to establish another fact.

The Court: I will excuse the jury and I will question the witness and do it in the presence of all counsel.

All right, the jury may be excused.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Londin: If your Honor please, I have been advised by Mr. Lankenau that at the time I believe Mr. Kove is referring to that the defendant, or the witness rather, the witness Oglesby lived in some other house than his current one, and if the questioning is restricted to that specific period, of course, the Government has no objection to that but only if we go further into the matter.

Mr. Kove: Where he lives at this moment, and I am not concerned about his family, your Honor, because——

The Court: Then it is resolved, isn't it?

Mr. Kove: I am not concerned about his family, your Honor.

(214)

The Court: Well, the Court would be concerned with the prospect or the possibility of injury to his family, and that I am concerned about.

Mr. Kove: I mean I am not concerned, so far as the questions are concerned, I am not interested in knowing——

The Court: The only reason I excused the jury is to find out whether or not this man had any fear if he gave the information, whether he had any fear of harm or injury which may come to members of his family.

Mr. Kove: All I am intending to convey to your Honor is that the purpose of the questioning was not to determine their present whereabouts, that is, the whereabouts of his family, because I am not at all concerned about that.

The Court: Under that circumstance we will allow the question with respect to where he met the agents and, as I understand it, he no longer lives at that address, so there will be no purpose of withholding the information.

Mr. Kove: Very frankly, I wanted to establish the fact that he was not in any prison.

(The jury returned to the courtroom and (215) the proceedings were resumed within the hearing of the jury as follows:)

The Court: All right, proceed. You may answer.

The Witness: 106th Street and West End Avenue.

By Mr. Kove:

Q. And when was that? A. Probably around in June when I first met them.

Q. Was this after you had pleaded guilty to the possession of narcotics in General Sessions? A. I had not pleaded guilty at that time.

David Ogelsby—for Government—Cross

The Court: You had not?

The Witness: I had not pleaded guilty.

Q. Well, had you already been arraigned at that time? A. Yes.

Q. And you had pleaded not guilty at that time? A. I hadn't pleaded at all.

Q. Well, had you been arraigned? A. I had been arraigned.

Q. And after you were arrested weren't you brought into the courtroom? A. I was out on bail.

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MICHAEL BOTTO—for Government—Direct

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(285)

Q. Ralph said he would supply you himself? A. Yes.

Q. And what did he say he would charge you? A. $300 an ounce.

Q. And what was he going to sell you? A. He was supposed to sell me pure.

Q. Pure what? A. Pure heroin.

Q. And did he supply you with pure heroin? A. Yes, sir.

(286)

Q. About how much did you buy from him? A. About an ounce or two a week.

Q. During what period did you buy the ounce or two a week from him after you went on your own? A. Well, from around June, 1955, to around June, 1956.

Q. During this period did you ever discuss the quality

of narcotics with Ralph? A. Well, I asked him what kind of stuff it was. He told me it was pure.

Q. Did you have cause to complain that it was not? A. I did.

Q. When was this? A. Some time around September or October I told him that the stuff was getting bad; that I was getting complaints on the stuff.

And he had told me that if I want to pay a little more money he would get me better stuff.

I told him I was willing to pay the extra money.

Q. Well, how much more did he want? A. He told me he had a connection for $400.

Q. $400 for pure? A. For an ounce of pure.

Q. Did he say who the connection was? (287) A. I asked him who the connection was.

He told me it was Black Mike.

Mr. Fusco: If your Honor pleases, I object to that as certainly not being in furtherance of any conspiracy charged here, and I object to it on the further ground that it is purely hearsay.

Mr. Londin: If your Honor please, the Government contends it is completely relevant and in furtherance of the conspiracy and offers it subject to connection.

The Court: It will be received subject to connection.

Mr. Fusco: We are thus being deprived of the right of cross-examination.

The Court: No, you will have your right to full cross-examination.

Mr. Fusco: Thank you.

Q. Did you ever meet Black Mike? A. Yes, sir.

Q. Did you learn his true name? A. No, sir.

Q. Do you see Black Mike here in court? A. The second on the left.

Mr. Londin: May the record indicate that (288) the witness has identified the defendant Galgano.

The Court: That is Michael Galgano?

Mr. Londin: That is correct.

The Court: When did you meet the man you now identify as Black Mike for the first time?

The Witness: I met him around July or August of '55—1955.

Mr. Fusco: Now, if your Honor pleases, may I ask you to urge this witness to kindly raise his voice and not have this going on in such a secretive way? Will you please ask him to raise his voice so we can all hear it?

The Court: You may move up.

Mr. Fusco: I have one difficulty here as I am looking at him through a corner of the courtroom to begin with.

The Court: Well, move right up to the front here and in that way you can look directly at him.

Mr. Fusco: Thank you.

Q. When did you first meet Mike Galgano?

Mr. Fusco: Hold up will you, please, a moment, and let me be seated, counselor?

Mr. Londin: I am sorry.

A. Some time in the summer of 1955.

• • • •

(297)

Q. Just a moment. Whom did Rich meet on the occasion of the next day when you went to the Russano home?

The Witness: He met Pat Russano.

The Court: Pat Russano?

The Witness: Pat Russano and Ralph Russano.

The Court: All right.

Q. Did Rich ever go to Russano's home again with you at any time? A. Yes, sir.

Q. About when did this happen or how frequently? A. Well, it happened occasionally—not occasionally; it happened a lot of times after he was my partner that we went up there together.

Q. For what purpose? A. To buy heroin.

Q. And did you buy heroin on each occasion? (298) A. Every time we went up we did, yes.

* * * *

(316)

Q. What did Shackelford say to you? A. He said that it was his car.

He called me up and he told me that Rich had taken his car and had got into an accident up in the (317) Bronx, and that Rich had told him to report the car stolen.

He said to me, "What should I do?"

I said, "If Rich told you to report the car stolen, report it stolen."

Q. Did you ever talk to Rich about this affair? A. The same night I got a phone call from Frank Rich.

Q. This was when? A. The same night of the accident.

Q. What month, and what year? A. In August, 1956.

Q. Yes? A. He told me that the Federal—that the narcotic agents chased him, and he backed the car up and he had got away.

Q. What do you mean "he backed the car up"? A. Well, the narcotic agents had stopped in front of him, pulled in front of him, and he backed the car up to get away from them, and in doing so he crashed up against a pillar—he backed into an el pillar.

Q. Where is this, did he say? A. Around 177th Street and Third Avenue, some place around there.

(318)

Q. Did Rich tell you what he had been doing at the time of the accident? A. Well, he had told me that he went up to get an ounce of heroin for Donald Bauer.

Q. From Donald Bauer? A. For Donald Bauer, and he thought that he was being set up.

Q. Did he in fact get this heroin for Donald Bauer? A. Yes, he told me that he got it from Ralph Russano.

Q. How much did he get? A. He told me that—he told me how he got an ounce and paid Ralph Russano a hundred dollars.

Q. Did he tell you whether anyone was with him? A. Yes, he told me that a fellow named Joe was with him, and that while he backed the car up getting away from the agents, that this other fellow had passed out in the car, and so he had to leave him in the car, but he did get away and he threw the stuff away and got away himself.

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(333)

By Mr. Londin:

Q. After you made bail and left West Street did you have a conversation with Michael Galgano? A. Yes, sir.

Mr. Kove: I suppose now would be the proper time to object to this testimony, your Honor.

The Court: I do not know the nature of the conversation as yet.

Mr. Kove: Well, your Honor, he said or asked in the question after he had made bail, and certainly that is after the arrest.

The Court: Yes.

This is being received at this point only with respect to the defendant Michael Galgano.

(334)

Mr. Fusco: May I object to that, your Honor?

The Court: And I am instructing the jury that it is not to be considered and it is not to be received with respect to any other defendant.

Mr. Fusco: On behalf of Michael Galgano I object, if your Honor pleases.

The Court: Overruled.

Mr. Fusco: Exception.

Q. Can you give us the approximate date of this meeting? A. October 15th or 16th. I think it was the 16th.

Q. And where did this conversation take place? A. The Delmont Bar.

Q. Where is the Delmont Bar? A. Around 180th Street and Third—Hughes Avenue, some place around there.

Q. Do you see here in court the man with whom you had this conversation? A. The second one from the left.

Mr. Londin: May the record indicate that the witness has identified the defendant Michael Galgano?

Q. And did you discuss narcotics with Galgano? A. I did.

(335)

Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

The Court: Now, members of the jury, I am emphasizing that this testimony is being received only as against the defendant Galgano; it is not being received as against any other defendant on trial, and you are not to consider it as being against any other defendant.

Q. Did you meet anyone else at this time? A. Yes, I was introduced to Tony Carminati at that time.

Q. Did you see him in court now? A. The fellow on the end.

(336)

Mr. Londin: May the record indicate that the witness has identified the defendant Anthony Carminati.

The Court: What date is this?

Mr. Londin: October 16th I think it was, your Honor.

(337)

Mr. Kove: That is objected to, your Honor, on the ground that as far as the indictment is concerned it is subsequent to the arrest, the conspiracy having already come to an end.

The Court: It will be received at this time as against the defendant Carminati only, and not as against any other defendant.

Q. Now, you met Carminati on the same day that you spoke to Galgano? A. That is right.

Mr. Kove: What was that date again?

Q. What was this date? A. The day after I got out. I believe it must have been the 16th of October.

Q. And how soon after meeting or talking to Galgano did you meet Carminati? A. About 15 minutes later, half an hour later.

Q. And did you go over yourself? A. No, Black Mike brought me over there.

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(339)

Q. Thereafter did you meet William McKenney? A. Yes, sir.

Q. When was that? A. I met him right outside the courtroom.

Q. When? A. It was on October 18th.

Q. Which court? A. Outside of Room 318.

Q. In this building? A. Yes, sir.

Q. Was anyone with you? A. Agent Giorgio.

Mr. Fusco: Agent who?

The Witness: Agent Giorgio.

Q. And who was with McKenney? A. Pat Russano and a few other people. I suppose they were relatives, all friends I mean; (340) Pat Russano, William McKenney, and there were a few other people there.

Q. And did you introduce Agent Giorgio to them? A. Yes, sir.

Q. How did you make the introduction? What did you say? A. I introduced him as Steve, my friend Steve from Jersey.

Q. Did you have a conversation then? A. Yes, we did have a conversation.

Q. Who participated in the conversation? A. McKenney, Pat Russano, Agent Giorgio and myself.

Q. What was said?

Mr. Fruchtman: Now, if your Honor please, I object to this conversation as being subsequent to the arrest of the defendant McKenney, and after the conspiracy terminated, which was terminated at the time of the arrest.

The Court: It willabe received at this point only as against the defendant McKenney.

Mr. Fruchtman: I respectfully except.

The Court: And not as against any other (341) defendant.

Mr. Fruchtman: I respectfully except.

Q. Who participated in the conversation? A. McKenney, Pat Russano, Agent Giorgio and myself.

Q. What was the conversation? A. Well, Pat had asked me if I needed any stuff.

And I told her I did.

She told me to meet her at 10 o'clock that night, that she would arrange to have a connection for me.

Q. Where did she tell you to meet her? A. 180th Street, up her house, 180th Street and Arthur Avenue.

Q. And did you meet her? A. Well, it was about 8 o'clock, and Agent Giorgio and myself, we went into the bar to have a few drinks.

Q. What bar? A. The Delmont Bar, 180th Street and Hughes Avenue.

Q. Did you meet Pat Russano? A. Pat Russano had come in about 9 o'clock with William McKenney.

(342)

So he had come over to the bar with her and we drank. We all had a drink together.

And she told me that she had met Sonny Della Universita that night at 9 o'clock on the corner, so if I had wanted any stuff for this Giorgio, she would be right on hand to take care of me.

Q. What happened then? A. So I asked Agent Giorgio if he wanted to buy any stuff.

And he said no.

Q. Did anyone come in? A. Then as we were drinking there with Giorgio, Ambrosini came in. He had came

over to us and he started talking to us and wanted to know if we wanted anything.

We told him, "No, we didn't want nothing."

Q. And what happened after that?

Mr. Fruchtman: I move to strike out all that testimony, if your Honor pleases.

The Court: McKenney was present on both occasions, was he?

The Witness: Yes.

Mr. Fruchtman: He did not participate.

The Court: I am receiving it only as against (343) McKenney.

Mr. Fruchtman: As against McKenney or as against Russano?

The Court: McKenney.

Mr. Fruchtman: McKenney was merely present, your Honor, and he did not participate in the conversation.

I respectfully except.

Q. What happened after that? Did you say anything to Pat Russano or McKenney? A. Well, we told him——

Q. Who is "we"? A. Agent Giorgio and myself.

Q. Did you both talk? A. Well, I said,—I said we didn't want to buy no stuff that night, that I would give her a call and let her know when I wanted something.

Q. What happened after that? A. Pat Russano and McKinney had left the bar and we stood in there and finished our drinks, and about 10 or 15 minutes later Agent Giorgio and myself left the bar.

As we are walking towards 180th Street and Third Avenue, we passed an Italian Restaurant there (344) and William McKenney was standing outside the restaurant.

I asked him, "What are you doing here?"
He said, "We are having a pie inside."

Mr. Kove: I am sorry, but I don't hear that.

Q. Would you repeat that, please, Mr. Botto? A. As we were walking towards 180th Street and Third Avenue we passed an Italian restaurant, and outside William McKenney was standing.

I asked him, "What are you doing here?"

He said, "I am having a pie."

So then he asked Giorgio and I to go in and have a pie with him.

So we went in there.

There was Sonny Della Universita, Pat Russano, William McKenney, Agent Giorgio and myself in there.

Q. Did McKenney say anything? A. Well, we were in there about five minutes and Sonny Della Universita and Pat left.

So McKenney told me he had come up to pick up an ounce of pure, that he didn't have enough money and they wouldn't sell it to him. He said he only (345) had $200, and they wouldn't sell it to him.

Q. Who told you that? A. McKenney.

Q. Do you see McKenney in the courtroom here? A. The second one on the right.

Mr. Londin: May the record indicate that the witness has identified the defendant William McKenney?

Your Honor, may I have a moment?

The Court: Yes.

Mr. Londin: Your Honor, may we have one more brief conference with counsel?

The Court: At the bench here?

Mr. Londin: Yes, sir, before you, your Honor.

(Discussion between Court and counsel at bench, without the hearing of the jury.)

The Court: I am sorry, members of the jury, but you will have to wait again.

(The following proceedings took place in the robing room.)

Mr. Lankenau: Your Honor, this witness has testified to a conversation that he had with Galgano on October 16 up at the Bronx, and in some part of (346) the same conversation he told Galgano that Sal Russano was complaining that no one had gotten him out on bail which he had been promised.

The Court: Yes.

Mr. Lankenau: And further, that Galgano asked him if he thought that Sal Russano would talk if he was not released on bail.

Galgano subsequently said that he was not sure what he could do about this.

Then later on when Galgano introduced him to Carminati, Galgano and Carminati had some discussion, some further discussion about getting Sal Russano out on bail, that Sal Russano might talk if they did not get him out on bail.

The Government will prove that Galgano subsequently went to a bondsman and began to make some of the arrangements for the release of Sal Russano on bail.

Subsequently Sal Russano was released on bail, but not on a bond that Galgano had signed, but on a bond signed by a third person, a relative of Sal Russano.

These conversations or the first one with Galgano would be offered just as against Galgano (347) and,

of course, the conversation subsequently in which Galgano and Carminati both participated, would be offered as against both.

The Court: What is the theory on which you offer it as against Galgano?

Mr. Lankenau: The theory is simply that this shows his intent, his consciousness, and the fact that he had an interest in getting Sal Russano out, because he was afraid that this man would talk.

Mr. Londin: And there is, of course, the express statements of both Carminati and Galgano that they were fearful that he would talk.

The Court: No, I think that you have gotten up to this point, of course, a substantial number of statements involving the conspiracy count, and I am not going to allow you to go further. Accordingly, we will exclude it.

Mr. Londin: Thank you, sir.

(At this point the conference between the Court and counsel in the robing room terminated and the following proceedings took place in open court.)

Mr. Londin: No further questions, your Honor.

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MICHAEL BOTTO—for Government—Cross

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(491)

The Court: Now, do you remember testifying yesterday that you had a conversation with Galgano in October of 1956?

The Witness: Yes.

The Court: Following your release on bail?

The Witness: Yes, sir.

The Court: And do you remember where that was?

The Witness: At the Delmont Bar.

The Court: Now, before I put any further questions, may I say this to the jury:

The Judge has a function under that ruling upon objections and preserving order during the course of the trial. One of his functions is to keep the issues within scope and ask questions in order to clarify matters that you may be called upon to decide.

Now, the fact that I ask questions is no indication that I have any point of view as to either the witness's credibility or as to how the case is to be (492) decided, nor do I entertain any opinion at all with respect to the subject matter. My asking the questions is simply to clarify the issues that are in the case.

You testified, did you not, that you saw Mr. Galgano at the Delmont Bar?

The Witness: Yes, sir.

The Court: That was in October 1956?

The Witness: Yes, sir.

The Court: Did you have any conversation with him on that occasion?

The Witness: Yes, sir.

The Court: Now, what was the conversation you had with him?

The Witness: Well, I had told him that I had just come out on bail and I had seen Ralph Russano down there and all the fellows that were in on this case——

Michael Botto—for Government—By the Court

Mr. Kove: If your Honor pleases, may I on behalf of the defendant Anthony Carminati respectfully object to this testimony as being conversation testimony coming after the date of the arrest.

The Court: This testimony, I will emphasize again as I did yesterday when the witness testified to it on direct examination, members of the jury, (493) is being received only with respect to the defendant Galgano who is the defendant with whom the witness alleges he had the conversation. In no single respect may it be considered insofar as any other defendant in the case is concerned.

All right.

The Witness: Well, I had met him in the trial and I told him that I just come out on bail and I saw all these people down there, and there was talk about Ralph, about the stuff being very bad, and Ralph told me he had got the stuff from Galgano, and I asked him why the stuff was bad.

Well, he said, when Ralph had got it the stuff was good, he didn't know what Ralph had done with it.

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(494)

By Mr. Fusco:

Q. Now, Mr. Botto, so that now you say, before we get to this October 1956 time, you say that you spoke to Michael Galgano, you say that there was another time in the winter of 1955 when you spoke to Michael Galgano, is that true? A. Well, we had a drink together.

Q. And where was this? A. The Delmont Bar.

Q. You just had a drink; is that right? A. That is right.

Q. And no conversations were had, is that right? A. We were talking about general things, but that was all.

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(511)

Q. Where were you living on October 16, 1956?

Mr. Londin: Objection, your Honor, immaterial.

The Court: Overruled.

Mr. Londin: If your Honor please, may we approach the bench on this question?

The Court: All right, come up.

(Discussion between Court and counsel at the bench off the record and out of the hearing of the jury.)

The Court: Members of the jury, please remain in the box. I won't be any longer than a few minutes. Bring the witness in, too.

(The following proceedings took place in the robing room.)

The Court: Is there any reason for your hesitancy in answering any question as to where you lived in October 1956?

The Witness: I don't want certain people to know where I live.

The Court: Why don't you want certain people to know where you live?

(512)

The Witness: Well, I don't know. They might go up there and try to intimidate me.

The Court: Are you afraid that they will?

The Witness: Well, I am not afraid, no, but I just don't like to give my address—

The Court: You are afraid?

The Witness: So that certain people will know where I live.

The Court: What was the statement that you made at the side bar before, Mr. Lankenau?

Mr. Lankenau: Your Honor, I stated that a witness in this case was approached and he was offered a bribe, and we feel that there is some danger of intimidation, and we feel for the safety of this man and his common-law wife and, therefore, unless there is some showing of materiality we ask that that objection be sustained.

The Court: Mr. Fusco, what is the materiality as to where he lived in October 1956?

Mr. Fusco: If your Honor pleases——

The Court: As long as you asked the question as to whether or not he made the call from the street or from his home.

Mr. Fusco: To show a motive here, if your (513) Honor pleases.

The Court: A motive for what?

Mr. Fusco: His going there.

The Court: Going where?

Mr. Fusco: To the Delmont, his purpose of mind.

The Court: What has that got to do with where he lived? Explain to me the materiality of it, that is, precisely as to this one question as to where he lived then.

Mr. Fusco: Well, I think that it fitted into the picture here to show the motive as to why he went to the Delmont Restaurant. That is the purpose of my asking the question, and where he got back to his home and made a definite phone call to the narcotic agents, and to show that that was the purpose why he went to the Delmont to obtain certain information on a person who was not yet arrested, and so that he would have a weapon in his hands on someone who had not been arrested as yet. That is the reason.

The Court: The Court is of the opinion that counsel has not in the slightest degree shown the materiality of the question put to the witness as to where he lived in October 1956, the day the witness states (514) he went to the Delmont Restaurant. Further, the Court is of the view that there is subtance made by the prosecution of possible harm or injury to the witness. Accordingly, the objection to the question is sustained.

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STEPHEN GIORGIO—for Government—Direct

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(536)

Q. Will you tell this Court and jury what happened on October 18, 1956, in the morning? A. On the morning of October 18, 1956, I accompanied Michael Botto to the Federal Courthouse where his trial was supposed to have been held that morning.

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(538)

Q. Did McKenney take any part in the conversation? A. After several minutes conversation, general conversation, he joined the group.

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He directed a question to her and he asked his aunt if Uncle Tony still has the stuff there.

(539)

And she replied that she didn't know for certain, but he rather insisted that the stuff must still be there.

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THOMAS DUGAN—for Government—Direct

(591)

Q. Were you engaged in the conduct of your official duties on August 22, 1956? A. I was.

Q. Will you tell us what you saw on that day? A. On August 22, 1956, Agent Cox and I were on surveillance in the vicinity of the Delmont Bar.

Q. Where is that located? A. That is at 180th Street and Hughes Avenue.

Q. At what time of the day was this? A. We started about three o'clock in the afternoon, and we observed Ralph Russano seated in a 1950 green Buick which was parked in front of the Delmont. His father, Salvatore Russano, was outside the car, and at times he would come over to the car and converse with Ralph.

At about 5 P. M., I observed a 1954 Oldsmobile convertible drive up and double park at the side of the Delmont Bar. The license plate on this car was XB4559, which is registered to Anthony Carminati of 2420 Camberling Avenue, in the Bronx.

I observed Anthony Carminati get out of the car and motion to Ralph Russano.

(592)

Ralph Russano walked over to him and the two men had a conversation which lasted about three minutes.

Q. Do you see the man that got out of that 1954 Oldsmobile here in Court today? A. Yes, I do.

Q. Will you step down and point him out please? A. He is the man that—the fifth man to my left seated.

Mr. Lankenau: May the record indicate that the witness identified Anthony Carminati?

Q. Where did this conversation between Ralph Russano and Anthony Carminati take place? A. It took place in the—partially in the street—the two men started to talk, and then they stepped over between the two parked cars, and they went up on the sidewalk.

It was all within the immediate area of say twenty feet from where they started.

Q. About how long did that take? A. Approximately ten minutes.

Q. Then what happened? A. Then Anthony Carminati got back in his car and drove off out of my view.

Shortly after that Ralph and Salvatore (593) Russano got into the 1950 Buick and drove to 180th Street and Crotona Avenue, where they parked the car and Salvatore Russano got out of the car and entered the building at 826 East 180th Street.

Thomas Dugan—for Government—Direct

The Court: What address?
The Witness: 826 East 180th Street.

He was in the building for approximately two or three minutes.

He came out of the building and re-entered the car and the car drove off in—drove west on 179th Street. At this point we were following—the car was traveling at a rate of speed of approximately fifteen miles an hour and we decided that we would pull off on 180th Street and try to pick up the car on the next block.

The next time I saw the car was on La Fontana Avenue between 179th and 180th Street, and just as we got there—apparently as we got there——

Q. What did you see? A. Yes.

Q. Just what you saw? A. As we got there, the 1949 Nash was pulling to a stop, was double parked in the middle of the street. (594) At this point, I saw Frank Rich emerge from a 1955 Ford with N. J. license plate JDV13.

This car is registered to David Shackleford of 776 Hunterdon Street in Newark.

Q. Do you see the man that got out of the 1955 Ford car here in Court today? A. Yes, I do.

Q. Will you please point him out? A. He is the man seated over there (indicating).

Mr. Lankenau: May the record indicate that the witness has identified Frank Rich?

Q. Then what happened? A. Then Rich walked over to the door of the 1949 Nash and he leaned on the door frame and had his head and the upper part of his body in the car.

After a minute or so, he left the Nash, walked over to the 1955 Ford and both cars drove off, the 1950 Buick drove off out of my view down La Fontana Avenue.

We followed the 1955 Ford which Rich and another man we later identified as Joseph Celso was seated in; the car drove to 178th Street and Third (595) Avenue where it was stopped for a red light.

At this point, I pulled the Government car in front of their car, blocking their way on Third Avenue.

Agent Cox got out of the car with his gun and badge in hand and I got out of the car on the driver's side, and as we got out of the car——

Q. Did either of you say anything? A. Pardon?

Q. Did either of you say anything? A. Yes, we identified ourselves. We said "Stop, we are Federal Agents," and held out our badges.

Q. Then what happened? A. Then Frank Rich put the car in reverse and sped backwards down Third Avenue, I guess about forty or fifty miles an hour.

I ran down Third Avenue after him shouting to halt and I fired two warning shots in the air.

After the shots were fired, the car smashed into an El pillar which was on the other side of Third Avenue evidently—on the opposite side of Third Avenue from the distance that they were going in.

(596)

As I ran up to the car, Frank Rich jumped out of the car and continued running north on Third Avenue.

As I passed the car, I noticed Joseph Celso unconscious as a result of the crash.

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(650)

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The Court: Which two cars?

The Witness: Between the 1955 Ford and the 1949 Nash.

The Court: Then the Russanos were in the Nash (651) car?

The Witness: This is on August—oh, excuse me, I am sorry. I made a mistake. They were in the 1950 Buick, excuse me.

The Court: That was the question I asked you this morning, and my impression was that this morning you testified that on August 22, when the car double parked, that the Ford car came along side of it and it was a Nash car, and that the Russanos were in this car. Now, is it your present testimony that it was a Buick car the Russanos were in?

The Witness: No, it was a 1950 Buick, and if I stated that it was a Nash this morning I was in error.

The Court: That is what I want to know. If you did state it was a Nash you were in error?

The Witness: Yes.

The Court: I did raise that point and there was some issue about it. However, you say now you mean that it was a Buick car?

The Witness: Yes.

The Court: That the Russanos were in?

The Witness: Yes.

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Thomas Dugan—for Government—Cross

(678)

Q. Now, Officer Dugan, when you arrested Michael Galgano were you alone? A. No, I was not.

. . . . .

Q. And did you have a warrant? A. Yes.

. . . . .

ANTHONY JOHNSON—for Government—Direct

(896)

. . . . .

Q. Agent Johnson, I show you Government Exhibit No. 7 for identification and ask you if you have ever seen that before? A. Yes, sir, I have.

Q. What is it and when did you see it?

Mr. Fusco: If your Honor pleases, I object.

Mr. Kove: I object to that.

Mr. Fusco: I have an objection, your Honor. There is no question about the exhibit being offered in evidence, which is one thing, but I think that we should be permitted to see the exhibits. There is no question as to the exhibit being marked for identification, but in view of the fact that the exhibits are only marked for identification, any such questions are premature, as I understand it, questions of the type which are now being asked by the Assistant United States Attorney.

The Court: He may state the circumstances and then I will decide upon it if an offer is made.

Q. When did you first see this? (897) A. August 20, 1956, sir, in the automobile, the Nash automobile of the Russanos, sir, in front of 787 Clinton Avenue in the Bronx, Tremont Street, in the Bronx. That is the envelope that I took from underneath the cushion in the automobile.

Q. How do you make that identification, Agent Johnson? A. By my initials and the time which are affixed beneath my initials, sir, on the rear of the envelope.

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(898)

The Court: Well, look at them. Are you able to state based on your own knowledge whether those two envelopes were contained in what you have referred to as Government Exhibit 7 for identification?

The Witness: Yes, sir.

Q. Agent Johnson, what did you then do with Government Exhibit 7 for identification? You say this was the package that you received? A. Yes, sir.

Q. In the car parked across the street? A. Yes, sir.

Q. What did you then do with it? A. I then returned to rejoin Agents Dugan and Cox, and the evidence or the envelope which I had taken from beneath the seats was given to Agent Cox, whereupon I initialed it and put a note of the time, sir.

Q. Was Government Exhibit 7 for identification opened at that time? A. No, sir.

Q. When was it opened? A. The following day, sir.

Q. And who had custody of it at that time? A. Agent Cox, sir.

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Anthony Johnson—for Government—Direct

(900)

Q. Will you describe what you saw in the package?

Mr. Fruchtman: I still object to it, if your Honor pleases.

The Court: Overruled.

Mr. Fruchtman: I respectfully except.

A. It was a white powder, sir.

Q. Who retained custody of Government Exhibit 7 for identification thereafter? A. Agent Cox, sir.

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ABRAHAM SCHWARTZ—for Government—Direct

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(917)

Q. And what did he say? A. He always said the same thing, "When you're ready, when you need it come down and talk to us."

Q. Do you recall an occasion when you met or saw Freddy or Vickey? A. Yes.

Q. As best you recall when did you first see them? A. The first or second time that we went down to see Mike and Ritchie.

Q. And whom were they with? A. With Ritchie.

Q. Do you recall an evening when Johnnie Sierra met Freddy or Vickey? A. Yes.

Q. When was that and where was it? A. It was about the third week—the second—the third week in June around.

Q. Of what year? A. 1956.

Q. And where was that? A. Around 51st Street and Eighth Avenue.

Q. Now, would you tell us what happened that evening?

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(921)

Mr. Sweeney: Now, I object, if your Honor pleases.

The Court: Please do not lead any more.

Does that exhaust your recollection as to what was said that evening?

The Witness: Well, he introduced us to Freddy and Vickey and he told us, "Well, I have been selling them stuff for about nine months and we are going out of business so I'll give you the customer."

Q. Was there anything else that you recall about that conversation with Ritchie that night? Will you answer orally? A. No.

Q. When did you next see Ritchie? A. The following day.

Q. Where did you see him? A. On Central Park South in the 70s or 80s. I don't remember.

Q. And who was present? A. Johnnie, myself, Ritchie, and some other fellow I don't know.

Q. Will you tell us what happened that day? A. Ritchie brought us a whole ounce and told us that we would have to split it up with the other (922) fellow.

Q. Then what happened? A. So I took the stuff and Ritchie left and the three of us, Johnnie, myself and this other fellow, we went to—well, I went to Johnnie's house and they went to Riverside Drive and waited for me to cut the package in half and bring this other fellow his half.

Q. Will you describe the package that you received and its contents? A. It was just a glassine envelope in a bank bag.

Q. And what did the contents of the glassine bag look like? A. Well, it was powder; it was heroin.

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(925)

Q. Did you have a conversation with Ritchie? A. Yes.

Q. What did you say to him and what did he say to you? A. Well, we told him we needed more stuff.

Q. And what did he say? A. He said, all right, that he would meet us the following day and give it to us.

Q. Was there any other conversation at that time? A. Well, we asked him for a whole ounce this time.

Q. And how much were you to pay for that? A. $400.

Q. Was there any other conversation? A. I don't remember.

Q. Do you recall whether there was any mention of a place to meet him? A. Yes.

Q. Where was that? A. On 180th Street and Broadway.

Q. And what happened? A. We went up to meet him then the next day.

Q. Do you know what day that was? (926) A. Yes, it was Friday, the 29th of June.

The Court: What year, please?

The Witness: 1956.

Q. How do you recall that date?

Mr. Fruchtman: I am sorry but I did not hear the date.

Mr. Lankenau: June 29, 1956.

Q. How do you recall that date? A. That evening I got arrested.

Q. Where did you see Ritchie on June 29th? A. 180th Street and Broadway on the corner.

Q. Who was present? A. Johnnie, myself, and Ritchie.

Q. What happened? A. We went into a bar, had a drink, and I took a package from Ritchie and gave him some money.

Q. Do you recall how much money you gave him? A. A couple of hundred dollars.

Q. Did you owe him any money after you had paid him that $200? A. About $300.

Q. Will you please describe the package you received from Ritchie? A. It was just a glassine envelope with powder (927) in it and in a bank envelope.

Q. Then what happened? A. I took the package and left and went down to Johnnie's house and waited for Johnnie to show up.

Q. Who had the package? A. I did.

Q. What did you do with the package? A. I hid it in a spot in the kitchen, sort of like a hole in the wall.

Q. What happened then? A. Johnnie came back and we made up a few more packages.

Q. What do you mean by "made up"? A. We used to take a little bit at a time. We did not make up a whole thing at once.

Q. What do you mean "make up"? A. We had to cut it.

Q. What does that mean? A. We had to cut the heroin and we had to mix it.

Q. What did you mix it with? A. Milk sugar.

Q. And what happened? A. Well, then, we didn't do anything until that evening.

(928)

Q. What happened that evening? A. That evening we went out to meet Freddy and Vickey.

Q. Where did you meet Freddy and Vickey? A. On Columbus Circle.

Q. Who was present? A. Johnnie, myself and Freddie.

Q. Was Vickey present? A. No.

Q. Then what happened? A. Gave the package to Freddie and we walked down the block. We walked down Central Park South with it to Sixth or Seventh Avenue, I don't remember, and that is when we got arrested.

Q. Then what happened? A. Well, they took us to Johnnie's house and they found the other package that was just picked up that morning, and they took us down to the station house and booked us there.

Q. You say you gave them a package. Now, what package was that? A. The package that I had picked up earlier that day.

The Court: Picked up from whom?

(929)

The Witness: From Ritchie.

Q. And to whom was that given if you know? A. I don't know. One of the police officers took it.

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ABRAHAM SCHWARTZ—for Government—Cross

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(958)

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Q. Was anything else said at the time that you can recall? A. We just took Freddy's and Vickey's phone number. It was all right with them. They weren't interested in where they got their drugs from just as long as they got them.

Q. Well, now, up until this time, you had told us that you knew about Fred and Vickey? A. That is right.

Q. You never went to their abode, to their residence? A. No, sir.

Q. They never came to your place of residence? A. No, sir.

Q. Where were you living then? A. Living at home.

Q. Where is that? A. In the Bronx.

Mr. Lankenau: Your Honor, once again I can't see any relevancy as to the place where this witness now lives.

The Court: Is it material?

(959)

Mr. Sweeney: Well, it may be a test on his credibility.

The Court: Objection sustained.

Q. With whom do you live there? A. My parents.

Q. Are you married? A. No.

Q. Were you working at the time that you were talking to Fred and Vickey and Rich? A. I stopped working two weeks before that.

Q. Well, where had you been working two weeks before that? A. I was a canvasser for Home Improvements.

Q. What was the name of your employer? A. Shapiro.

Q. And the address of the establishment? A. I worked for an individual. He worked for—he worked for a company and I worked direct for him.

Q. Well, were you on anybody's payroll? A. I was on Shapiro's payroll.

The Court: How long had you worked for Shapiro?

The Witness: Two years.

The Court: Regularly?

(960)

The Witness: Yes, sir.

The Court: Steadily employed?

The Witness: Yes.

The Court: You had not been in any difficulty before this time?

The Witness: No, sir.

By Mr. Sweeney:

Q. Well, then, there came a time when you say that you obtained some narcotics from Rich? A. That is right.

• • • •

(961)

• • • •

Q. No, I mean approximately the date. A. Somewhere around the third week of June, 1956.

• • • •

(962)

Q. Well, then, the next day, did you have delivered to you the narcotics? A. Yes, sir.

Q. Did you pay any money that day? A. No, sir.
Q. That was the third week in June? A. Yes, sir.

• • • • •

(967)

• • • •

Q. Well, now, after you had made the second purchase, was that the occasion when you were arrested? A. That is right, the same day.

The Court: Is that June 29th? Was that the date testified to?

The Witness: Yes, sir.

The Court: June 29th?

(968)

The Witness: Yes, sir.

Q. And you have been convicted? A. Yes, sir.
Q. And you are awaiting sentence? A. That is right.
Q. Well, is it your belief that you will derive some benefit with respect to your sentence by coming here and testifying? A. I don't know.
Q. You don't have any belief about it? A. I don't know.
Q. Did you discuss it with anybody? A. My attorney.
Q. Well, as far as you're concerned you don't know? A. That's right.
Q. You don't have any belief on it? A. No, sir.
Q. Now, when were you convicted? A. It was about two or three weeks ago.
Q. And it was by a plea of guilty? A. Yes, sir.
Q. Has any date been fixed for sentence? A. The 19th or the 21st.

(969)

The Court: Of when?

The Witness: Of this month.

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• • • •

(990)

• • • •

Q. When did you first see this? A. On the ground between Sierra and Schwartz.

Q. And what happened next? A. I interrogated the two men, and as a result of that questioning I went to Sierra's apartment.

Mr. Sweeney: Now, I object to that, if your Honor pleases, unless the words of the conversation are used.

The Court: Do you want him to state the entire conversation?

Mr. Sweeney: Yes.

(991)

The Court: All right, Mr. Witness, you will have to state what you said to Sierra and Schwartz and what each one of them said to you.

Mr. Kove: May we have a date?

The Court: Pardon me?

Mr. Kove: What is the date of that conversation.

The Court: June 29, 1956, at the time of the arrest.

Mr. Kove: Thank you.

The Witness: I asked the defendant Schwartz his address.

And he told me that it was 1184 Walton Avenue in the Bronx.

I asked Sierra where he lived.

And he told me 425 West End Avenue.

I asked him if they had any additional drugs.

And they said yes.

I asked them where it was, where any additional drugs would be found.

They said at Sierra's residence.

Following that we went to Sierra's residence.

Q. Do you recall whether they said anything else that night during the interrogation? (992) A. Later on I asked them where they got the drugs.

Q. And what did they say? A. They said that they had purchased it.

Mr. Sweeney: Now, if your Honor pleases, may the officer state who said what?

The Court: Yes.

Q. Who was saying this now? A. Well, I questioned them separately.

And Sierra said that he bought the stuff earlier in the day from a fellow by the name of Ritchie.

I asked Schwartz where he got the stuff.

And he stated that he—that Sierra bought the stuff earlier in the day from a fellow by the name of Ritchie.

Q. Was there anything else said in this interrogation that you recall? A. I asked how much they paid for the stuff.

They told me separately and jointly, one or the other—

Mr. Fusco: I object to that, if your Honor pleases.

The Court: Leave out "one or the other, separately and jointly."

The Witness: In each other's company that (993) they had agreed——

Mr. Fusco: I object to that, your Honor, "that they had agreed."

The Court: What was said? Is that what they said, that they had agreed?

The Witness: That is correct, your Honor.

Mr. Fusco: I withdraw that. I did not understand it.

The Witness: They were paying $400 for the drugs. They said that they had actually paid 100 and owed 300 and it was to be paid subsequent to this time to this man Rich.

Q. Was there anything else said in this interrogation that you recall? A. Not to my knowledge.

Q. Now, after this interrogation where did you go? A. To Sierra's residence.

Q. And what happened there? A. On further questioning in the room of Sierra about the drug, he directed Schwartz to give me the stuff as he called it.

Q. What happened then? A. Schwartz went to the kitchen and reached up into the ceiling and removed from above the cupboard (994) a bank envelope which contained—which in turn contained a glassine envelope of white powder.

Mr. Lankenau: Will you please mark this for identification?

(Government Exhibit 21 for identification.)

Q. I show you Government Exhibit 18 for identification and ask you if you have ever seen that before? A. Yes, I have.

Q. When did you see it? A. When Schwartz handed it to me.

Q. Is this the package that was handed to you by Schwartz on the occasion you just testified to? A. Yes, it is.

• • • •

ROBERT CLARKE—for Government—Direct

• • • •

(1001)

Q. In what condition were Government Exhibits 17, 18 and 19 when you received them? A. Exhibit 17 was sealed with a gum tape seal which is still present.

Exhibit 18 contained a double glassine envelope which was sealed at the time that I opened it and this can to the best of my recollection, it was not sealed, but it had initials on it which it still has.

Q. Did you analyze Government Exhibits 18, 17 and 18? A. Yes, I did.

Q. What were the results of those analyses? A. I found that Exhibits 17 and 18 contained heroin in the concentration of 60.1 per cent.

Mr. Lankenau: I have no further questions. I offer it in evidence at this time Government Exhibits 17, 18, 19 and 20 for identification.

Mr. Kove: I respectfully object on the ground that it is not binding on the defendant Carminati.

The Court: Government Exhibits 17 and 18 were offered during the course of the testimony by witness——

Mr. Lankenau: Doyle.

Colloquy of Counsel

The Court: Which witness was it?

(1002)

Mr. Lankenau: The police detective.

The Court: I am asking about Government Exhibits 17 and 18.

Mr. Lankenau: Yes, sir.

The Court: And they were offered through whom?

Mr. Lankenau: They were identified by Doyle but they were not offered, your Honor. They were offered through the testimony of this witness.

The Court: I understand that they were first identified by the witness Doyle, is that right?

Mr. Lankenau: That is correct, your Honor.

The Court: And is that the envelope that he obtained from Schwartz?

Mr. Lankenau: That is correct, your Honor.

The Court: And the other man who was with him at the time?

Mr. Lankenau: That is correct.

The Court: They will be admitted.

(Government Exhibits 17 for identification through 20 for identification now received in evidence.)

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IN THE

Supreme Court of the United States

October Term, 1957

No. 496

MICHAEL GALGANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No.

MICHAEL GALGANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Michael Galgano, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 23rd day of August, 1957.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 245 Fed. 2d —. A copy of this opinion is hereto annexed and marked Exhibit "A" hereto.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 23rd day of August, 1957.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit, nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1), on the grounds that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit. Certiorari is sought on the grounds that the United States Circuit Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in a way in conflict with an applicable decision of this Court and that the United States Court of Appeals for the Second Circuit has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Questions Presented for Review

The Petitioner Michael Galgano was convicted in the United States District Court for the Southern District of New York on count 14 of the indictment herein, the sole count charging said petitioner with a crime. This count

charged the Petitioner with the crime of unlawfully, wilfully and knowingly conspiring to violate the Narcotics Law of the United States (Title 26, Sections 4704(a), 4701, 4703, 4724(c), 4771(a); Title 21, Sections 173 and 174; Title 18, Sections 371 U. S. C.). The judgment of conviction of the United States District Court for the Southern District of New York was based upon a verdict of "guilty" by a jury and was dated and entered the 5th day of February, 1957. Under said judgment of conviction, the Petitioner was sentenced to imprisonment for a period of 10 years on said count 14. The questions presented for review with regard to the trial of the aforementioned indictment are:

1. Was the quasi admission of the Petitioner Galgano allegedly made to the witness Botto a co-defendant and co-conspirator named in the indictment, which the said co-conspirator testified to on the trial of this criminal proceeding, corroborated by substantial independent evidence which tended to establish the trustworthiness of said statement or quasi admission?

(a) Was other hearsay testimony of the witness Botto such substantial independent evidence as would corroborate the quasi admission of the Petitioner testified to by this same witness?

(b) Was Government's Exhibit 33 in evidence (10 empty Bankers Trust Co., envelopes found in the home of the Petitioner at the time of his arrest), such substantial independent evidence as would tend to corroborate the quasi admission of the petitioner testified to by the witness Botto?

2. Was error committed by the District Court in admitting over objection, Government's Exhibit 33 in evidence

(10 empty Bankers Trust Co., envelopes found in the residence of the Petitioner at the time of his arrest) and if so, was not this a substantial prejudice to the Petitioner's rights?

Statutory Provisions Involved

Title 18 United States Code.

"§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, United States Code.

"§173. *Importation of narcotics drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All nar-

cotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotics drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, §2, 35, Stat. 614; Jan. 17, 1914, c. 9, 38, Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657."

"§174. Same; penalty; evidence

Whoever, fraudulently or knowingly imports or brings any narcotics drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such

acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code.

Sections 4701, 4703, 4704(a), 4724(c), 4771, 7237(a) (c).

(These sections are not printed in this petition as they refer to the requirement or to payment of taxes and tax stamps for narcotic drugs and no defense of payment of taxes and attachment of stamps to containers has been raised.)

Concise Statement of the Case

This petition seeks to review a judgment of the United States Court of Appeals for the Second Circuit, dated and entered the 23rd day of August, 1957, which affirmed a judgment of conviction of the Petitioner rendered the 6th day of February, 1957, in the United States District Court for the Southern District of New York, which judgment of conviction was based upon a verdict of a jury finding

the Petitioner guilty under Count 14 of the indictment herein, the sole count charging the Petitioner with a crime, a copy of said count is hereto annexed and marked Exhibit "B" hereof. Count 14 of the indictment herein charged the Petitioner along with other co-defendants and co-conspirators with the crime of unlawfully, wilfully, and knowingly conspiring to violate the Narcotics Laws of the United States (Title 26, Section 4704(c), 4701, 4703, 4724(c), 4777(a); Title 21, Sections 173 and 174; Title 18, Section 371 U. S. C.). Under the aforementioned judgment of conviction, the Petitioner was sentenced to 10 years imprisonment.

An outline of the proof offered at the trial concerning the Petitioner is as follows:

The testimony of Thomas Dugan, a Government agent insofar as it related to the Petitioner Galgano was that agent Dugan arrested Galgano at his home on November 19, 1956 (34a).* At the time of his arrest, the Petitioner Galgano was at home with his wife and two children (36a). Agent Dugan testified that he found ten empty Bankers Trust Co. envelopes on the living room table of Galgano's home (35a). No narcotics, glassine envelopes or the like were found either at Galgano's home or on the person of the Petitioner Galgano. The empty Bankers Trust Co. envelopes which were ten in number were received in evidence over the Petitioner's objection and marked Government's Exhibit 33 (35a). On being questioned by agent Dugan at the time, both the Petitioner and his wife stated that their children brought the envelopes home and that

* Numerals in parentheses followed by letter "a" refer to numbered pages of the Petitioner's Appendix on his appeal to the United States Court of Appeals for the Second Circuit.

they used them for taking school and lunch money to school (39a-40a).

An additional statement given by the Petitioner Galgano to Government Agents was read into the trial record by Susan Caporaso, a Government stenographer who read from a transcript of a statement given by Galgano to the Government, which transcript was marked Government's Exhibit 36 (42a). In this statement, the Petitioner merely stated that he is married, has two children, ages 7 and 13 and was known, in addition to his regular name, by the nick-name "Black Mike" (43a).

By stipulation between the parties, another statement given by the Petitioner on November 19, 1956, was read into the record of the trial (45a). In this statement, the Petitioner denied knowing the witness Michael Botto by photograph or name (46a). The Petitioner, however, stated that in about the middle of October, a fellow named Blackie just out of jail, came into the bar drunk, that he asked for Galgano and tried to make trouble and that Galgano took this fellow by the collar and threw him out of the place (47a).

Aside from the aforementioned statements read into the record and the testimony of agent Dugan theretofore mentioned, the sole witness against the appellant Galgano was one Michael Botto, named as a co-defendant in this indictment, who has already pleaded guilty to the charge against him (R. 355).* According to Botto's own testimony, he, Botto, has a long criminal record which includes conviction on three felony charges (R. 270-272).

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* Numerals in parentheses preceded by the letter "R" refer to page number of documents in the record on appeal to the United States Court of Appeals for the Second Circuit.

The Government witness Botto is a self-admitted narcotics peddler who did business with Ralph and Sal Russano (8a-12a), co-defendants who were named in the indictment, but whose trial was severed from that of the Petitioner and who were described by the Court in its charge as being the prime movers in the conspiracy (66a).

The Government witness Botto testified that he met the Petitioner Galgano two or three times at the most (31a), once in either July or August of 1955 (31a) and the other time, the date that he was released on bail on the present charge which was October 16, 1956. At the time of the meeting on October 16, 1956, Botto claimed an alleged conversation with the Petitioner Galgano as follows:

"Q. And where did this conversation take place? A. The Delmont Bar.

Q. Where is the Delmont Bar? A. Around 180th Street and Third-Hughes Avenue, some place around there.

Q. Do you see here in court the man with whom you had this conversation? A. The second one from the left.

Mr. Londin: May the record indicate that the witness has identified the defendant Michael Galgano?

Q. And did you discuss narcotics with Galgano? A. I did.

(335) Q. What did you say to Galgano and what did he say to you about the narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversa-

tion. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me 'He was getting it from you.'

He told me that when he gave the stuff to Ralph the stuff was all right" (29a).

The testimony of Botto concerning the October 16, 1956, conversation was contradicted by the statement of the Petitioner Galgano quoted by agent Dugan in his testimony wherein Galgano stated that he took the individual named Blackie by the collar and threw him out of the bar.

Martha Bridges, a barmaid employed at the Delmont Bar testified for the Petitioner. Martha Bridges corroborated the statement of the Petitioner Galgano read into evidence wherein she stated that she saw the Petitioner Galgano order Botto out of the bar and that Botto left (76a).

The above outline covers the proof offered at the trial concerning the Petitioner Galgano. None of the other witnesses who testified for the Government mentioned the Petitioner Galgano either directly or indirectly.

The Petitioner did not testify on the trial herein.

Basis for Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crime charged was conspiracy to receive, possess and sell heroin in violation of Federal Narcotics Law (21 U. S. C., Sections 173, 174; 26 U. S. C., Sections 4701, 4703, 4704(a), 4724(c), 4771(a)). All in violation of Title 18, U. S. C., Section 371.

Reasons Relied on for the Allowance of the Writ of Certiorari

The basis of this application is that the United States Court of Appeals for the Second Circuit by its judgment of affirmance dated the 23rd day of August, 1957, which affirmed the judgment of conviction of the Petitioner rendered by the United States District Court for the Southern District of New York on the 6th day of February, 1957, decided an important question of Federal Law in a way in conflict with an applicable decision of this Court and has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The particular decision of this Court that it is claimed the opinion and decision of the United States Court of Appeals for the Second Circuit are in conflict with is *Opper* v. *U. S.*, 348 U. S. 84, 99 L. Ed. 101, 75 S. Ct. 158. In the *Opper* case where this Court affirmed a conviction for violation of 18 U. S. C., Section 281, this Court reviewed the law regarding corroboration of confessions and admissions. In the *Opper* case the alleged admissions were made to F.B.I. Agents and this Court after stating that the admissions of the accused were of the same character as confessions and required corroboration went on to state at page 93 as follows:

> "However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."

A review of the evidence of the trial in the present case and the opinion of the United States Court of Appeals will show that the so-called quasi admission consisted of testimony of the witness Botto, named in the indictment as a co-conspirator and defendant, who testified that on October 16, 1956, the day after the said witness was released on bail, after having been held on a complaint upon which the indictment herein was based stated that he had a conversation with the Petitioner herein, which conversation is set forth verbatim on pages 9, 10 of this petition. The Court of Appeals in its decision stated that this admission was corroborated by a statement of the co-defendant Russano to the witness Botto, naming the Petitioner as his, Russano's source of supply. In this opinion, however, the United States Court of Appeals lost sight of the fact that it was permitting the witness Botto to corroborate one portion of his testimony (the testimony concerning Galgano's quasi admission) by another part of the same witness' own testimony (the other portion of Botto's testimony concerning a statement by the co-conspirator Russano that the Petitioner supplied Russano with narcotics). In short, according to the reasoning of the Court of Appeals, Botto was permitted to raise his testimony by its own boot straps to satisfy the requirement of corroboration required by the rules of evidence (See *U. S.* v. *Di Orio*, 150 F. 2d 938; Cert. denied 66 S. Ct. 175, 326 U. S. 771, 90 L. Ed. 465; *Anderson* v. *U. S.*, 124 F. 2d 58).

Concerning Government's Exhibit 33 in evidence, which were 10 empty Bankers Trust Company envelopes that were found in the home of the Petitioner at the time of his arrest, it is the Petitioner's position that these envelopes were inadmissible as having no bearing on the trial of the

issues and that their admission substantially prejudiced the trial of the Petitioner.

Earlier in the trial with regard to certain other defendants, Government's Exhibits 7 and 18 were admitted in evidence. These exhibits consisted of Bankers Trust Co. envelopes that were wrapped around glassine containers containing narcotics. It was the similarity in appearance of the aforementioned envelopes to the envelopes that were found in the Petitioner's home at the time of his arrest that is claimed to be a link in the chain of evidence tying the Petitioner to the conspiracy.

The statement of the United States Court of Appeals in its opinions that the envelopes were found on the Petitioner at the time of his arrest is factually incorrect as the evidence shows that the envelopes were found in the apartment of the Petitioner at the time of his arrest. Likewise it is undisputed that this apartment was the residence of the Petitioner, his wife and two children and that no narcotics, meeting place of conspirators or other criminal propensity was shown with regard to said apartment. In short by the admission of Exhibit 33 which exhibit had no logical relevance, the jury was confused and permitted to pyramid assumption upon assumption in order to connect the Petitioner with the crime charged, and likewise the Court of Appeals attempted to use this exhibit as independent evidence connecting the Petitioner with the crime so as to corroborate his purported admission.

It was conceded by the Trial Judge, the Hon. Edward Weinfeld, that if Exhibit 33 was inadmissible that the case against the Petitioner would have collapsed.

Sanders v. *U. S.*, 238 F. 2d 145, which case was used by the United States Court of Appeals in its opinion to justify the admissibility of Exhibit 33 is not in point as that case related to burglar's tools and equipment wherein the Court specifically stated as follows:

> "It is the generally accepted rule that in a case in which the defendant is charged with the offense of burglary, after proof of the burglary has been introduced the prosecution may show that the defendant had burglar tools or implements in his possession soon after the time of the commission of the offense and may introduce such tools or implements in evidence."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—October Term, 1956.

(Argued June 7, 1957 Decided August 23, 1957.)

Docket No. 24570

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., and MICHAEL GALGANO,

Appellants.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appellants appeal from judgments of guilty entered upon jury verdicts. Southern District of New York, Weinfeld, *J.* Affirmed.

PAUL W. WILLIAMS, U. S. Attorney, Southern District of New York (Jerome J. Londin, Robert Kirtland, Asst. U. S. Attorneys, of counsel), *for appellee.*

JACOB W. FRIEDMAN, New York City, *for appellants Carminati and McKenney.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, Allen S. Stim, Otto F. Fusco, of counsel), New York City, *for appellant Galgano.*

Exhibit A—Opinion of the United States Court of Appeals

WATERMAN, *Circuit Judge*:

Appellants were convicted upon an indictment charging them with a conspiracy in violation of 18 U. S. C. §371 to receive, possess, and sell heroin in violation of the federal narcotics laws. 21 U. S. C. §§173, 174; 26 U. S. C. §§4701, 4703, 4704(a), 4724(c), 4771(a). Each appellant contends that the evidence as to him was insufficient to prove his participation in the conspiracy and each assigns as error certain rulings made by the trial court as to the admissibility of evidence. In addition to these contentions appellants Carminati and McKenney also contend the trial court erred in curtailing the cross-examination of two government witnesses, with respect to certain portions of the instructions to the jury, and in refusing the jury a full transcript of the stenographic minutes of the trial.

A conspiracy to violate the narcotics laws was conclusively proved. Ample evidence was introduced at the trial from which the jury could find the existence of a conspiracy at the center of which were Ralph and Salvatore Russano,[1] who were shown to be middlemen in a system of narcotics distribution involving more than 20 persons. In May 1955 Ralph Russano and one Michael Botto[2] (named in the indictment as a codefendant and co-conspirator with the Russanos, the appellants, and a number of others) began

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[1] The Russanos were both named as co-conspirators and co-defendants in the indictment, which charged them with substantive offenses as well. To each of these charges they pleaded guilty and on February 5, 1957 both were sentenced by the trial court.

[2] Botto pleaded guilty to the conspiracy charged placed against him, but the record does not disclose whether he has been sentenced.

dealing in heroin together. Shortly thereafter, the appellant McKenney, a cousin of Russano, joined their operation and the profits of the enterprise were then divided among the three of them. Botto later left this partnership and went into business for himself, although he continued to obtain his supply of heroin from Russano. In September or October of 1955, during the course of a discussion in which Botto complained to Russano of the quality of the heroin with which the latter had been supplying him, Russano said that he had a supplier from whom a better quality of heroin might be obtained. In response to an inquiry from Botto, Russano stated that Galgano was the supplier to whom he had referred. Subsequently, in October of 1956, Botto had a discussion with Galgano, whom he had testified to having met twice previously. During the course of this discussion, Galgano admitted supplying Russano with substantial amounts of heroin.[3] A month later Galgano was arrested in his home where the arresting officers discovered twelve Bankers Trust Company envelopes of the same type that had elsewhere been taken by government agents from the possession of other members of the conspiracy and that had been shown to have been used by these persons to deliver heroin.

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[3] Galgano, when arrested, denied that he knew Botto. He recalled, however, that on the date the above discussion allegedly occurred, a man known to him as "Blackie" was forcibly ejected by him from the bar where Botto testified that the conversation had taken place. A witness corroborated this version of the incident.

The trial judge charged the jury that Galgano could be convicted only if they believed Botto's testimony. Hence they must have accepted Botto's version of the events of that day and have believed that the conversation took place then and there as Botto detailed it.

David Oglesby, named in the indictment as a co-conspirator, implicated McKenney. He testified that in August of 1956 he called Ralph Russano to make arrangements for a purchase of heroin on behalf of a government agent. Russano said that he was unable to make the delivery but would send McKenney. Later that day McKenney kept the appointment with Oglesby which had been arranged by Russano.

Botto also implicated McKenney. In addition to his testimony concerning the partnership between Russano, McKenney, and himself during the summer of 1955, Botto testified that on October 18, 1956, McKenney participated in a discussion, which took place in a federal building, in which arrangements were made for the sale of heroin. Later that day Botto and a government agent met McKenney and several others, at which time McKenney told them that he had just refused to make a sale because the purchaser did not have enough money.[4] This testimony was confirmed by the government agent who was with Botto.

Oglesby was also the government's chief witness against the appellant Carminati. He testified to numerous transactions in which Carminati participated, only several of which need to be related. In the middle of October 1955, at which time Oglesby had made a purchase from the Russanos, Ralph Russano identified Carminati as one of his suppliers. A month later, when Oglesby again con-

[4] The testimony of Botto is ambiguous with respect to whether McKenney was the seller or the purchaser in this transaction. The government agent, however, testified that McKenney was the seller and the trial court so indicated to the jury in its summation of the evidence. The appellants do not contest this interpretation of the evidence.

tacted Russano about making a purchase, he was told that he would have to wait a while. After a discussion with Carminati, Russano told Oglesby that he was unable to obtain heroin for him at that time. In December of 1955, Russano informed Oglesby that if he wanted heroin he would have to take it "cut." When Oglesby objected, Russano made a telephone call and shortly thereafter Carminati came in. After a short discussion Carminati told Oglesby, "you will have to take seven ounces of cut stuff, which is the best we can do." Oglesby testified that he again had contact with Carminati in January of 1956 when he approached Russano about making a sale to him on consignment. Russano called Carminati, and after the latter advised him not to enter into the transaction, Russano told Oglesby, "I am sorry. Nothing can be done. I can't do anything." In addition, Oglesby testified to several other transactions in which Carminati was involved, and a government agent gave other evidence tending to prove Carminati's participation in the conspiracy.

This evidence adduced against each appellant, if competent as to him, was clearly sufficient to enable the jury to find that each of the appellants participated in the conspiracy charged by the Government in the indictment. Both Carminati and McKenney were shown to have participated actively in transactions between Russano and his customers. In addition, there was ample evidence from which the jury could believe that Carminati and Galgano each supplied heroin to the Russanos on more than one occasion. The circumstances, therefore, are unlike those in *United States* v. *Reina et al.*, 242 F. 2d 302 (2 Cir. 1957),

where evidence of a single sale by one Valachi was held insufficient to justify an inference that Valachi knew the sale was in execution of the larger venture which made up the conspiracy. Cf. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957). In the present case, the evidence established that Carminati knew the Russanos intended to resell the heroin. There was other evidence, consisting of Galgano's admission to Botto that he supplied substantial quantities of heroin to Russano, which justified an inference that Galgano also knew that Russano intended to resell the heroin which he obtained from Galgano.[5]

In *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952), a similar case, we stated:

> Here then we have evidence of several sales, at different periods, by Rosario and Tramaglino, of marihuana to the same group of buyers with knowledge on the part of the two suppliers that several conspirators were involved in the purchases and

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[5] Botto's testimony concerning this admission was as follows:

Q. And did you discuss narcotics with Galgano? A. I did.

Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

Galgano's reply to Botto's statement that Galgano was the source of the heroin which Russano sold to Botto constitutes an admission by Galgano that he did, in fact, supply heroin to Russano. 4 Wigmore on Evidence, §1071 (3d Ed. 1940).

that the purchases were for resale. This was enough, we think, to show that each appellant, as supplier, participated in, and acted to further the ends of, the conspiracy. It did not matter that neither had dealings with one another; each performed the same role at successive stages for the same ends. The overall conspiracy was the plan conceived by the intermediary group * * * to buy and resell marihuana at a profit. Both Rosario and Tramaglino knew and participated in this plan by furnishing the essential ingredient—the marihuana. In United States v. Bruno, 2 Cir., 105 F. 2d 921, 922, a case quite similar to this one, we said, in confirming a conviction of smugglers, middlemen, and retailers, for a single conspiracy to import and distribute narcotics illegally: "* * * the smugglers knew that the middlemen must sell to the retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of the part with which he was immediately concerned, was dependent upon the success of the whole."

Since the evidence we have reviewed is sufficient to sustain the jury's verdict, we turn to the several contentions of the appellants that portions of that evidence were improperly admitted and that other errors occurred during the course of the trial.

The statement made by Galgano to Botto in October 1956, that he had supplied Ralph Russano with heroin, was admitted only against Galgano; and was properly so received as an admission by Galgano of his role in the conspiracy. 4 Wigmore on Evidence §1048 (3d Ed. 1940). Galgano, however, contends that the admission was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84 (1954). We think that, with respect to Galgano, Russano's disclosure to Botto that Galgano was his supplier (provided this conversation is admissible), together with the Bankers Trust Company envelopes found in Galgano's possession, constitute sufficient independent evidence of participation in the conspiracy to corroborate Galgano's admission and thus to satisfy the requirements of the *Opper* case. Galgano further contends, however, that Russano's statement to Botto implicating Galgano was hearsay and was not admissible against him. We disagree with Galgano.

The declaration of a conspirator is admissible against a co-conspirator if there is independent evidence of the existence of the conspiracy, *Glasser* v. *United States*, 315 U. S. 60 (1942), and if the declaration is in furtherance of the conspiracy, *Krulewitch* v. *United States*, 336 U. S. 440 (1949). Galgano's admission, properly admitted whether or not it was corroborated, provided sufficient independent evidence of the existence of the conspiracy to satisfy the first requirement. We believe that Russano's statement to Botto naming Galgano as a source of supply from whom a better quality of heroin might be obtained, must be considered as in furtherance of the conspiracy. Botto was a regular customer of Russano. He complained to Russano

of the quality of the heroin which he was obtaining from the latter. Russano indicated that he could obtain pure heroin, and in response to Botto's question, stated that Galgano was the source of supply. We understand this statement to be further assurance that a better quality heroin was available and therefore in furtherance of the conspiracy to distribute narcotics.

Galgano's contention that the Bankers Trust Company envelopes were inadmissible at the trial is also without merit. Similar envelopes, shown to be connected with the conspiracy, had already been introduced into evidence. While Galgano had the right, which he exercised, of offering other explanations for his possession of the envelopes, the fact that this evidence, standing alone, might not have been sufficient to sustain a conviction did not affect its admissibility. It was relevant as bearing upon his connection with the conspiracy. Cf. *Sanders* v. *United States*, 238 F. 2d 145 (10 Cir. 1956).

The appellants Carminati and McKenney, relying on *Alford* v. *United States*, 282 U. S. 687 (1931), urge as ground for reversal that two witnesses for the Government, Oglesby and Schwartz, were excused from giving their addresses on cross-examination. In *Alford* the Supreme Court held that a witness may be cross-examined as to his residence because this information would enable the jury to identify the witness in his environment, might, under some circumstances, provide new avenues of exploration for defense counsel. With these factors in mind, we turn to the facts of the present case. With respect to Oglesby, the claim is frivolous. Appellants

obtained all the information about his residence that they asked of him. Nor is there any merit in their contention that they were erroneously denied knowledge of the residence of Schwartz. Schwartz was a witness for the Government and during his cross-examination counsel for one of the defendants questioned Schwartz about certain transactions occurring during June 1956. His question as to the address of the witness at that time was met by an objection from the Government which was sustained by the court. The only information which was elicited was that Schwartz resided in the Bronx. During the testimony of the very next witness, however, Schwartz's address was revealed. Under the circumstances of this case, we cannot find that the appellants were injured by the ruling curtailing Schwartz's cross-examination or that the ruling was reversible error. Schwartz had undergone thorough cross-examination. He had testified that he lived with his parents in the Bronx and he gave full details of past and present employment. His testimony further revealed that he had pleaded guilty and was awaiting sentence in the present case, that he had never before been an informer or witness for any prosecutor in a criminal case, that he had no previous criminal record, and that he did not use narcotics. This testimony gave the jury ample information with which to determine the credibility of the witness. Furthermore, although the next witness revealed Schwartz's address, defense counsel did not attempt to recall him or in any way seek to make use of this information.

Carminati seeks a reversal of his conviction because of an incident which occurred during the testimony of Botto.

Botto testified that he was arrested on the conspiracy charge and taken to the West Street jail. He related a conversation he had while there with Rich, a codefendant, in which Rich stated that Carminati was Ralph Russano's connection. Counsel objected to the testimony. The court ordered it stricken and instructed the jury to disregard it. If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, *Graham* v. *United States*, 15 F. 2d 741 (8 Cir. 1926), reversal would be required. *Krulewitch* v. *United States*, *supra*. But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made. The testimony was stricken as soon as counsel made known his objection, the trial court then proceeding at once to protect the defendant's rights. No error was committed.

Other issues raised by Carminati and McKenney deserve only brief mention. Both object to the charge of the trial court that "constructive possession" of a narcotic drug is sufficient to raise the presumption created by 21 U. S. C. §174. However, the charge was contained in that portion of the instructions which dealt with the substantive counts against another defendant not involved on this appeal and did not deal with the conspiracy. Under these circumstances, even if the charge was erroneous, as to which we express no opinion, the appellants would have no ground for complaint.

Carminati assigns as error that portion of the trial court's summation of the evidence dealing with Oglesby's testimony. The trial court, in an unqualified statement, re-

ferred to Carminati as the man whom Oglesby had identified as being involved in a certain transaction. Carminati contends that Oglesby had testified only that Carminati resembled the man whom he had seen, but on the whole record it is clear that the trial court was correct in its summation.

Nor was there error in the refusal of the trial court to provide the jury with a full set of the minutes. We have previously recognized that this is a matter within the discretion of the trial court, *U. S.* v. *Rosenberg*, 195 F. 2d 583 (2 Cir. 1952). Moreover, it is evident from the record that in the present case the jury obtained all of the information which it had requested.

Other errors alleged by the appellants to have been committed during the course of the trial have been considered by us, but they are without merit and do not warrant discussion.

Judgments affirmed.

Exhibit B

Count 14 of the Indictment

FOURTEENTH COUNT

1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO, ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., FRANK RICH, ROBERT GUIPPONE, JOSEPH AMBROSINI, CARLOS RUIZ, MARY LOU BROLET RUSSANO, SEBASTIAN DELLA UNIVERSITA, MICHAEL BOTTO, MICHAEL GALGANO, DAVID SHACKELFORD, DONALD BAUER and ADA VOLKELL, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as Wilson, white male, blonde hair, 30-35 years of age, approximately 5'11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to

the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of April, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, ROBERT

Exhibit B—Count 14 of the Indictment

GUIPPONE, RALPH RUSSANO, SALVATORE RUSSANO, and MICHAEL BOTTO met.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of May, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, JOSEPH AMBROSINI, RALPH RUSSANO, SALVATORE RUSSANO, MICHAEL BOTTO and FRANK RICH had a conversation.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1955, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO, sold approximately 2 ounces of heroin to CARLOS RUIZ in John's Bar, 180th Street and Third Avenue, Bronx, N. Y.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of September, 1955, in the Southern District of New York, in the Delmont Bar, 624 East 180th Street, Bronx, New York, MICHAEL GALGANO and MICHAEL BOTTO had a conversation.

5. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of October, 1955, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO and ANTHONY CARMINATI met David Ogelsby and two unknown men in John's Bar on 180th Street and Third Avenue, Bronx, N. Y.

6. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y.,

Exhibit B—Count 14 of the Indictment

SEBASTIAN DELLA UNIVERSITA and MICHAEL BOTTO had a conversation.

7. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO and ANTHONY CARMINATI, had a conversation with David Ogelsby on the corner of Clinton and East Tremont Avenues, Bronx, New York.

8. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of March, 1956, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO, ANTHONY CARMINATI, David Oglesby and John Doe, a/k/a Angelo had a conversation in a luncheonette at the corner of East Tremont and Park Avenues, Bronx, New York.

9. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of June, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., MICHAEL BOTTO had a conversation with Abraham Schwartz and John Sciarra.

10. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 23rd day of June, 1956, in the Southern District of New York, in the vicinity of 77th Street and Central Park West, FRANK RICH sold approximately ½ ounce of heroin to Abraham Schwartz and John Sciarra.

11. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of June,

1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., DAVID SCHACKELFORD received one hundred dollars ($100.00) from John Sciarra.

12. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of June, 1956, in the Southern District of New York, in the vicinity of 180th Street and Broadway, New York, N. Y. FRANK RICH sold approximately 1 ounce of heroin to Abraham Schwartz and John Sciarra.

13. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of August, 1956, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO sold 352 grains of heroin to an agent of the Federal Bureau of Narcotics in a luncheonette at the corner of East Tremont and Clinton Avenues, Bronx, N. Y.

14. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the Southern District of New York, DONALD BAUER and FRANK RICH met in the vicinity of 51st Street and 8th Avenue, New York, N. Y.

15. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the vicinity of the Delmont Bar 624 East 180th Street, Bronx, N. Y., ANTHONY CARMINATI and RALPH RUSSANO had a conversation.

16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of Au-

gust, 1956, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO sold approximately 1 ounce of heroin to FRANK RICH in the vicinity of LaFontaine Avenue between 179th Street and 180th Streets, Bronx, N. Y.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of September, 1956, in the Southern District of New York, WILLIAM MCKENNEY, JR. had a telephone conversation with David Oglesby.

18. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 25th day of September, 1956, in the Southern District of New York, JOSEPH AMBROSINI while driving a 1956 Oldsmobile between the vicinity of 696 East Fordham Road, Bronx, N. Y. and the vicinity of Fordham Road and the Grand Concourse, sold approximately 2 ounces of heroin to Carrenza M. Howard.

19. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the vicinity of the U. S. Courthouse, Foley Square, New York, N. Y., WILLIAM MCKENNEY, JR. and MARY LOU BROLET RUSSANO had a conversation with MICHAEL BOTTO.

20. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the Southern District of New York, in Silverio's Restaurant, 542 East 180th Street, Bronx, N. Y., MARY LOU BROLET RUSSANO and SEBASTIAN DELLA UNIVERSITA had a conversation.

Exhibit B—Count 14 of the Indictment

21. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, JOSEPH AMBROSINI while driving a 1956 Oldsmobile between the vicinity of Fordham Road and 189th Street, Bronx, N. Y. and the vicinity of Tremont and Crotona Avenues, Bronx, N. Y. sold approximately 2 ounces of heroin to Carrenza M Howard.

22. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, ADA VOLKELL placed 2 ounces of heroin in a stairwell window ledge located in 496 East 189th Street, Bronx, N. Y.

23. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, ADA VOLKELL and JOSEPH AMBROSINI had in their possession in apartment E-25 496 East 189th Street, Bronx, New York approximately 8½ ounces of heroin, glassine bags, quinine, sugar, scales, and other miscellaneous equipment commonly employed in diluting heroin.

(Title 18, United States Code, Section 371).

PAUL W. WILLIAMS
United States Attorney

.....
Foreman

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IN THE

Supreme Court of the United States

October Term, 1957

No. 497

ANTHONY CARMINATI and WILLIAM McKENNEY, JR.,
Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 38, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

ANTHONY CARMINATI and WILLIAM MCKENNEY, JR.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Anthony Carminati and William McKenney, Jr., by their attorney, Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on each of the petitioners.

Opinions Below

The opinion of the Court of Appeals is set forth in the Appendix, *infra*. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on August 23, 1957. No application was made to that Court for rehearing. The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 173; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); Federal Rules of Criminal Procedure, Rule 17c.

Questions Presented

(1) Whether the Government proved the conspiracy charged in the indictment, and whether the alleged participation of these petitioners in a separable transaction or transactions suffices to sustain the conviction.

(2) Whether the action of the District Court in excusing two key witnesses for the Government from giving their addresses and in curtailing cross-examination in that connection did not constitute reversible error.

(3) Whether the improper reception of alleged declarations of a coconspirator made after the termination of the alleged conspiracy did not constitute a grave violation of these petitioners' rights.

(4) Whether the reception in evidence of an alleged conversation between Ralph Russano and three unidentified persons was prejudicial and reversible error.

(5) Whether the District Court erred in charging that constructive possession created a presumption of guilt.

(6) Whether the District Court's unqualified description of the identification of petitioner Carminati was error.

(7) Whether the District Court erred in twice refusing the request of the jury during its deliberations that the minutes be read to it.

Statutes Involved

Apart from those provisions of the law relating to the payment of taxes and the attaching of stamps, which are not pertinent herein, the statutes involved are as follows:

Title 18 United States Code.

> "Sec. 371. Conspiracy to commit offense or to defraud United States.
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, United States Code.

> "Sec. 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeiture.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported

and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, Sec. 2,. 35, Stat. 614; Jan. 17, 1914, c. 9, 38, Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

"Sec. 174. Same; Penalty; evidence.

"Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, conceal-

ment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five years or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement

The petitioners herein appealed in the first instance from a judgment of the United States District Court for the Southern District of New York, convicting them of the crime of conspiracy (18 U. S. C. Sec. 371) to violate certain statutes of the United States dealing with narcotic drugs, namely, 26 U. S. C. Secs. 4704(a), 4701, 4703, 4724(c), 4771(a) and 21 U. S. C. Secs. 173 and 174. Trial was had between January 7, 1957, and January 14, 1957, before Weinfeld, *D. J.*, and a jury, and the two present petitioners were convicted only on the conspiracy count, which was the 14th count of the indictment. Petitioner Carminati was sentenced to 10 years and petitioner McKenney to 5 years.

With the exception of the overt acts, that count of the indictment charging conspiracy reads as follows:

"FOURTEENTH COUNT

"1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Schackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and 'John Doe' also known as Wilson, white male, blonde hair, 30-35 years of age, approximately 5' 11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

"2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as

aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) of Title 26, United States Code.

"3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

"4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code."

An inspection of the foregoing count discloses that the indictment named some 24 conspirators, including the two petitioners herein.

We observe at the outset that the identification of petitioner Carminati was of extremely imperfect character. When the Government's chief witness, David Oglesby, a narcotics addict with a long criminal record (R. 3), was asked whether he saw in the courtroom the individual who had made certain equivocal remarks, he said (R. 44), "I see a man resembling him." This was the basis of the

identification, and on cross-examination with regard to Carminati (R. 82-83), he said, "Well, according to my memory it is the best I can say was that he looks like him, looks exactly like him." At several points the trial Court assisted the witness in the attempted identification of Carminati (R. 56-57, 83).

It must also be remembered that without the testimony of Oglesby it would have been impossible to procure a conviction of Carminati. This was conceded by the Government and the jury was charged accordingly. The other testimony with respect to Carminati (or the person who Oglesby said resembled Carminiati) was of a vague and uncertain character consisting of several unintelligible remarks and the conversation regarding the quality of some merchandise entirely susceptible of an innocent construction (R. 741-750).

With regard to appellant McKenney, the testimony consisted mainly of alleged conversations in his presence (R. 755-765), without proof that he participated in any conspiracy or did anything in furtherance thereof. The trial Court also assisted in his implication (R. 79).

The best that can be said for the Government's position is that the proof against these petitioners was certainly not of a clear or conclusive character. The least weight that is ascribable to this aspect of the case is that it entitled them to a trial free from error, so that incorrect rulings which otherwise might be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United*

States, 344 U. S. 414, 97 L. Ed. 447. Especially where the case is "a close one" and not "open and shut," an error otherwise harmless will be deemed prejudicial. *Bihn* v. *United States,* 328 U. S. 633, 90 L. Ed. 1485.

While petitioners appreciate that this is not the forum in which to press questions of fact, it is urged on their behalf that they have consistently maintained their complete innocence, a circumstance which certainly should not detract from the validity of their arguments in any appellate tribunal.

Lest there be any question as to the availability of objections, we desire to point out that counsel for one of the defendants inquired at the beginning of the trial whether all of them might have objections noted when any other presented one, whereupon the Court ruled (R. 13):

> "Yes, the objection of one counsel and the ruling will inure to the benefit of all unless otherwise so stated at the time."

Reasons for Granting Writ

The opinion of the Court of Appeals presents several questions of law, and it is at least arguable whether the determination does not conflict with opinions of the Supreme Court of the United States on like questions. It is also believed that the view taken by the Court of Appeals is contrary to the proceedings disclosed by the record. A number of the rulings involved constitute prejudicial error. Undersigned counsel is aware of the requirements of this Court's rules that the questions presented for review be expressed without unnecessary detail, and an attempt will be made to present these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION NO. 1

Whether the Government proved the conspiracy charged in the indictment, and whether the alleged participation of these petitioners in a separable transaction or transactions suffices to sustain the conviction.

The theory of prosecution herein was a conspiracy involving 24 named individuals. The metaphor employed by the Government was that of a wheel in which the two Russanos were at the center and the other individuals the spokes. The proof, however, fell far short of showing any single scheme involving all or a great number of the persons named. This constituted a fatal variance between the evidence and the indictment under which petitioners were convicted. No fair construction of the proof can assimilate the separable and unrelated transactions to a single conspiracy. The point was duly raised and preserved by the several motions of petitioners for a dismissal of the indictment. Petitioner Carminati urged specifically that there was no evidence with respect to his conduct "which would place him in the conspiracy, which is, of course, the only count he is charged with in this indictment" (R. 740-741). Counsel for McKenney likewise moved for a judgment of acquittal at the close of the Government's case "on the ground that the Government has failed to show that McKenney participated in this conspiracy or that he had any knowledge that the conspiracy existed" (R. 765).

The holding of the United States Court of Appeals herein seems to be an instance of an unauthorized deviation from

the decision in *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. Ed. 1557. While petitioners relied on it below, it was not even mentioned in the opinion. This Court will recall that there a number of defendants were indicted for a single conspiracy to obtain loans upon fraudulent applications. The evidence showed that the applications were separately made and that their only connection with each other was that they were negotiated by the same person who, acting as broker, was the central figure in the conspiracy. The Court held that even though the result would probably have been the same in separate trials, the defendants obviously being guilty of making the fraudulent applications, the error of combining the charges in one indictment could not be viewed as harmless and the conviction had to be reversed. It is submitted that the authority of this decision vitiates the conviction herein. Moreover, the holding below appears to run contrary to the decision of the same Court of Appeals in *United States* v. *Koch*, 113 F. 2d 982, where a defendant purchasing a large quantity of cocaine from a third person was prosecuted for conspiring to import and dispose of narcotics. The Court held that the Government was required to show that the defendant in some way knowing associated in the unlawful common enterprise to import drugs and dispose of them unlawfully, and that a mere showing of his having purchased a large quantity was insufficient.

QUESTION NO. 2

Whether the action of the District Court in excusing two key witnesses for the Government from giving their addresses and in curtailing cross-examination in that connection did not constitute reversible error.

One of the Government's most important witnesses was one Abraham Schwartz. His testimony fills about 80 pages of the record (R. 477-558). He made some six or seven sales (R. 547-548). Nevertheless, he was excused, on the Government's objection from giving his address (R. 531-532).

A like error occurred with regard to David Oglesby (R. 89-92), who may be considered the Government's chief witness. He was permitted merely to indicate the neighborhood where he lived.

It should hardly be necessary at this time to argue *de novo* that the environment of a witness is invariably a fundamental consideration in the approach to a thorough cross-examination. The barring of this avenue effectively keeps from the jury a mass of information which necessarily bears on the credibility of the witness. It also forecloses further investigation by the defense. The question was the subject of a comprehensive discussion by the late Mr. Chief Justice Stone in *Alford* v. *United States*, 282 U. S. 687, 75 L. Ed. 624, writing for the unanimous Court. Without quoting from the illuminating rationale of the holding, we simply mention that the trial Court was there viewed as having cut off at the outset all inquiry on a subject to which the defense was entitled to great latitude of cross-examination. It was said that "this was an abuse

of discretion and prejudicial error." Nor was it deemed necessary to pass on any other point presented, the judgment of conviction being reversed for that error alone.

The Court below, following the Government's argument, held that the error with respect to Schwartz was cured by the testimony of a subsequent witness, one Doyle (R. 564). The attempted curing of the error is untenable. To begin with, Doyle merely stated that Schwartz gave a certain address at the time of arrest—clearly hearsay. Secondly, the arrest took place on June 29th, 1956, whereas the date of the testimony was Janaury 10th, 1957; the inquiry of counsel was not directed to the former address of the witness. Thirdly, it was recently held in *United States* v. *Fontana,* 231 F. 2d 807, by the Third Circuit, that where the trial Court improperly curtails cross-examination, the error is not cured by subsequent evidence bearing upon the same subject-matter, nor does this constitute an adequate substitute for the right to cross-examine. The cross-examination is a matter of right which must be exercised and afforded in its proper context. That Court relied principally on *Alford* v. *United States,* 282 U. S. 687, 75 L. Ed. 624, whose authority has not been restricted or impaired—despite the Government's suggestion to the contrary, the United States Attorney arguing that that case "must not be extended beyond its obvious limits." Finally, the action of a trial judge in excusing a witness from giving his address inevitably creates in the minds of the jury the apprehension that the defendants on trial are of a character to inflict some grievous harm upon the witness, all to defendants' manifest prejudice. When a controlling holding of this Court is misapplied or its applicability is clouded with doubt, a classic case is presented for the granting of certiorari.

QUESTION NO. 3

Whether the improper reception of alleged declarations of a coconspirator made after the termination of the alleged conspiracy did not constitute a grave violation of these petitioners' rights.

During the direct examination by the Government of the important witness Michael Botto (p. 51) the following occurred:

> "Q. You testified that you were arrested shortly thereafter? A. Yes.
>
> "Q. About when was this? A. Columbus Day, 1956.
>
> "Q. Were you taken to West Street? A. Yes, sir.
>
> "Q. Meet anyone there? A. Yes, I met Ralph Russano, Salvatore Russano, Frank Rich, Dave Shackelford, and this fellow Joe.
>
> "Q. Did you talk to Rich? A. Yes, I talked to Rich about the case. And he had told me there are a lot of names mentioned in this case that he never heard of. Then after he told me some of the names, I said, 'There are some of the names I never heard of.' And he had told me that this Tony Carminati was Ralph Russano's connection."

At this juncture counsel for three defendants jumped to their feet and objected to the conversation. The Court struck it out, observing that counsel had allowed the answer to go in. This was not so. The witness was merely asked whether he had spoken to Frank Rich. He was not asked for the conversation. Where, then, was the opportunity to object? The highly damaging nature of the testimony is self-evident. The reception in evidence of an alleged declaration of a coconspirator after the conceded termination

of the conspiracy is clear and reversible error. *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790, where Mr. Justice Jackson vividly expounded the utter ineffectiveness of an instruction to a jury to disregard prejudicial evidence. See also *Lutwak* v. *United States*, 344 U. S. 604, 97 L. Ed. 593.

The learned Court of Appeals below recognized the seriousness of receiving such evidence, saying:

> "If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, . . . reversal would be required. *Krulewitch* v. *United States, supra.* But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made."

It would appear that the onus of objecting to an innocent question on the assumption that the witness is about to give an unresponsive answer, creates an intolerable burden upon counsel. Under the circumstances disclosed, it is submitted that the error was ineradicable.

QUESTION NO. 4

Whether the reception in evidence of an alleged conversation between Ralph Russano and three unidentified persons was prejudicial and reversible error.

The chief witness for the Government, Oglesby, testified that he overheard a conversation between Ralph Russano, one of the conspirators named in the indictment, and three unknown men concerning "three pieces"—meaning three ounces of narcotics (R. 36-38). This testimony was received over objection and upon the assertion of the Govern-

ment in the presence of the jury that these unidentified men were coconspirators (R. 36-37). The meeting was not brought home to or connected with petitioners, and the evidence was highly prejudicial. It certainly had no logical connection with any activity of a defendant and was remote from the issues of the trial.

The law relating to the trial of conspiracy indictments does not sanction the introduction of such proof, even though the prosecution be for that "elastic, sprawling and pervasive offense," wherein "loose practice" has been denounced as "a serious threat to fairness in our administration of justice." *Krulewitch* v. *United States*, 336 U. S. 440, 445, 93 L. Ed. 790. It must be noted that this testimony was received prior to any mention of these petitioners in the case. It is still the rule that "a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry* v. *United States*, 7 F. 2d 28, 30. The acts of an alleged coconspirator are admissible only after defendant on trial has become associated therewith. See 3 Underhill on Criminal Evidence, 1957 Ed., Sec. 863.

QUESTION NO. 5

Whether the District Court erred in charging that constructive possession created a presumption of guilt.

21 U. S. Code Sec. 174, to the extent at present pertinent, provides:

> "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed evidence to authorize conviction

> unless the defendant explains the possession to the satisfaction of the jury."

After charging the foregoing, the District Judge went a step beyond the statute and instructed (see Galgano app., 79a):

> "Again, you understand it is not necessary to show actual physical or direct possession by any defendant. Possession of any sort—either actual or constructive—is sufficient to raise the presumption under the statute which I have just read to you and to place upon the accused the burden of explaining the possession to the jury."

It is true that no exception was taken to the qualification, but it would appear to be a plain error affecting petitioners' rights. Although the statutory presumption arising from proof of possession has been held constitutional (see *Yee Hem* v. *United States*, 268 U. S. 178, 69 L. Ed. 904), we feel that the extension of the provision to embrace a constructive possession is not a correct or valid interpretation of the law. Nor does any holding of this Court compel such construction. Any statute making possession presumptive evidence of guilt, being in derogation of the common law and of the presumption of innocence, is required to be given a strict construction. See *United States* v. *One Studebaker Roadster*, 40 F. 2d 557.

QUESTION NO. 6

Whether the District Court's unqualified description of the identification of petitioner Carminati was error.

In discussing Oglesby's testimony (Galgano app. 68a) as implicating petitioner Carminati, the District Judge stated in his instructions without the slightest qualification that this was the man "whom he identified in the courtroom as the defendant Anthony Carminati." To this portion of the charge due exception was taken (87a). We have already indicated how halting and uncertain the supposed identification was, so that the reference to the supposed identification as being categorical was unfair and tended to deprive petitioner Carminati of the benefit of an identification equivocal at best. "It is error for the court, when stating the evidence, to ignore material portions of it." Abbott's Crim. Trial Prac., 4th Ed., Sec. 670. A summary of the evidence is required to be fair, adequate and accurate. *Boatright* v. *United States*, 105 F. 2d 685; *Minner* v. *United States*, 57 F. 2d 506; *Davis* v. *United States*, 227 F. 2d 568.

QUESTION NO. 7

Whether the District Court erred in twice refusing the request of the jury during its deliberations that the minutes be read to it.

An unusual occurrence arose during the jury's deliberation on the case. On two separate occasions, at intervals of three hours, the jury requested that the minutes of the trial be read to it (Galgano app. 93a, 96a). Each time the Court refused, saying, "I am definitely opposed to giving them a full set of the minutes." We recognize that there

may be cases where refusal is discretionary (cf. *United States* v. *Rosenberg*, 195 F. 2d 583). But elsewhere it has been held error. See *People* v. *Henderson*, 4 Cal. 2d 188, 48 P. 2d 17; *Lett* v. *Commonwealth*, 284 Ky. 267, 144 S. W. 2d 505; *Jackson* v. *Commonwealth*, 60 Va. 656. The time necessitated for the reading has been held not to justify a refusal. *United States* v. *Campbell*, 138 F. Supp. 344. If the matter should be deemed discretionary, we submt that discretion was abused in a case turning upon doubtful identification and where petitioners' connection with the alleged conspiracy was remote.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—October Term, 1956.

(Argued June 7, 1957 Decided August 23, 1957.)

Docket No. 24570

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., and MICHAEL GALGANO,

Appellants.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appellants appeal from judgments of guilty entered upon jury verdicts. Southern District of New York, Weinfeld, *J.* Affirmed.

PAUL W. WILLIAMS, U. S. Attorney, Southern District of New York (Jerome J. Londin, Robert Kirtland, Asst. U. S. Attorneys, of counsel), *for appellee.*

JACOB W. FRIEDMAN, New York City, *for appellants Carminati and McKenney.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, Allen S. Stim, Otto F. Fusco, of counsel), New York City, *for appellant Galgano.*

WATERMAN, *Circuit Judge*:

Appellants were convicted upon an indictment charging them with a conspiracy in violation of 18 U. S. C. §371 to receive, possess, and sell heroin in violation of the federal narcotics laws. 21 U. S. C. §§173, 174; 26 U. S. C. §§4701, 4703, 4704(a), 4724(c), 4771(a). Each appellant contends that the evidence as to him was insufficient to prove his participation in the conspiracy and each assigns as error certain rulings made by the trial court as to the admissibility of evidence. In addition to these contentions appellants Carminati and McKenney also contend the trial court erred in curtailing the cross-examination of two government witnesses, with respect to certain portions of the instructions to the jury, and in refusing the jury a full transcript of the stenographic minutes of the trial.

A conspiracy to violate the narcotics laws was conclusively proved. Ample evidence was introduced at the trial from which the jury could find the existence of a conspiracy at the center of which were Ralph and Salvatore Russano,[1] who were shown to be middlemen in a system of narcotics distribution involving more than 20 persons. In May 1955 Ralph Russano and one Michael Botto[2] (named in the indictment as a codefendant and co-conspirator with the Russanos, the appellants, and a number of others) began

[1] The Russanos were both named as co-conspirators and co-defendants in the indictment, which charged them with substantive offenses as well. To each of these charges they pleaded guilty and on February 5, 1957 both were sentenced by the trial court.

[2] Botto pleaded guilty to the conspiracy charged placed against him, but the record does not disclose whether he has been sentenced.

dealing in heroin together. Shortly thereafter, the appellant McKenney, a cousin of Russano, joined their operation and the profits of the enterprise were then divided among the three of them. Botto later left this partnership and went into business for himself, although he continued to obtain his supply of heroin from Russano. In September or October of 1955, during the course of a discussion in which Botto complained to Russano of the quality of the heroin with which the latter had been supplying him, Russano said that he had a supplier from whom a better quality of heroin might be obtained. In response to an inquiry from Botto, Russano stated that Galgano was the supplier to whom he had referred. Subsequently, in October of 1956, Botto had a discussion with Galgano, whom he had testified to having met twice previously. During the course of this discussion, Galgano admitted supplying Russano with substantial amounts of heroin.[3] A month later Galgano was arrested in his home where the arresting officers discovered twelve Bankers Trust Company envelopes of the same type that had elsewhere been taken by government agents from the possession of other members of the conspiracy and that had been shown to have been used by these persons to deliver heroin.

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[3] Galgano, when arrested, denied that he knew Botto. He recalled, however, that on the date the above discussion allegedly occurred, a man known to him as "Blackie" was forcibly ejected by him from the bar where Botto testified that the conversation had taken place. A witness corroborated this version of the incident.

The trial judge charged the jury that Galgano could be convicted only if they believed Botto's testimony. Hence they must have accepted Botto's version of the events of that day and have believed that the conversation took place then and there as Botto detailed it.

David Oglesby, named in the indictment as a co-conspirator, implicated McKenney. He testified that in August of 1956 he called Ralph Russano to make arrangements for a purchase of heroin on behalf of a government agent. Russano said that he was unable to make the delivery but would send McKenney. Later that day McKenney kept the appointment with Oglesby which had been arranged by Russano.

Botto also implicated McKenney. In addition to his testimony concerning the partnership between Russano, McKenney, and himself during the summer of 1955, Botto testified that on October 18, 1956, McKenney participated in a discussion, which took place in a federal building, in which arrangements were made for the sale of heroin. Later that day Botto and a government agent met McKenney and several others, at which time McKenney told them that he had just refused to make a sale because the purchaser did not have enough money.[4] This testimony was confirmed by the government agent who was with Botto.

Oglesby was also the government's chief witness against the appellant Carminati. He testified to numerous transactions in which Carminati participated, only several of which need to be related. In the middle of October 1955, at which time Oglesby had made a purchase from the Russanos, Ralph Russano identified Carminati as one of his suppliers. A month later, when Oglesby again con-

[4] The testimony of Botto is ambiguous with respect to whether McKenney was the seller or the purchaser in this transaction. The government agent, however, testified that McKenney was the seller and the trial court so indicated to the jury in its summation of the evidence. The appellants do not contest this interpretation of the evidence.

tacted Russano about making a purchase, he was told that he would have to wait a while. After a discussion with Carminati, Russano told Oglesby that he was unable to obtain heroin for him at that time. In December of 1955, Russano informed Oglesby that if he wanted heroin he would have to take it "cut." When Oglesby objected, Russano made a telephone call and shortly thereafter Carminati came in. After a short discussion Carminati told Oglesby, "you will have to take seven ounces of cut stuff, which is the best we can do." Oglesby testified that he again had contact with Carminati in January of 1956 when he approached Russano about making a sale to him on consignment. Russano called Carminati, and after the latter advised him not to enter into the transaction, Russano told Oglesby, "I am sorry. Nothing can be done. I can't do anything." In addition, Oglesby testified to several other transactions in which Carminati was involved, and a government agent gave other evidence tending to prove Carminati's participation in the conspiracy.

This evidence adduced against each appellant, if competent as to him, was clearly sufficient to enable the jury to find that each of the appellants participated in the conspiracy charged by the Government in the indictment. Both Carminati and McKenney were shown to have participated actively in transactions between Russano and his customers. In addition, there was ample evidence from which the jury could believe that Carminati and Galgano each supplied heroin to the Russanos on more than one occasion. The circumstances, therefore, are unlike those in *United States* v. *Reina et al.*, 242 F. 2d 302 (2 Cir. 1957),

where evidence of a single sale by one Valachi was held insufficient to justify an inference that Valachi knew the sale was in execution of the larger venture which made up the conspiracy. Cf. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957). In the present case, the evidence established that Carminati knew the Russanos intended to resell the heroin. There was other evidence, consisting of Galgano's admission to Botto that he supplied substantial quantities of heroin to Russano, which justified an inference that Galgano also knew that Russano intended to resell the heroin which he obtained from Galgano.[5]

In *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952), a similar case, we stated:

> Here then we have evidence of several sales, at different periods, by Rosario and Tramaglino, of marihuana to the same group of buyers with knowledge on the part of the two suppliers that several conspirators were involved in the purchases and

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[5] Botto's testimony concerning this admission was as follows:

Q. And did you discuss narcotics with Galgano? A. I did.

Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

Galgano's reply to Botto's statement that Galgano was the source of the heroin which Russano sold to Botto constitutes an admission by Galgano that he did, in fact, supply heroin to Russano. 4 Wigmore on Evidence, §1071 (3d Ed. 1940).

> that the purchases were for resale. This was enough, we think, to show that each appellant, as supplier, participated in, and acted to further the ends of, the conspiracy. It did not matter that neither had dealings with one another; each performed the same role at successive stages for the same ends. The overall conspiracy was the plan conceived by the intermediary group * * * to buy and resell marihuana at a profit. Both Rosario and Tramaglino knew and participated in this plan by furnishing the essential ingredient—the marihuana. In United States v. Bruno, 2 Cir., 105 F. 2d 921, 922, a case quite similar to this one, we said, in confirming a conviction of smugglers, middlemen, and retailers, for a single conspiracy to import and distribute narcotics illegally: "* * * the smugglers knew that the middlemen must sell to the retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of the part with which he was immediately concerned, was dependent upon the success of the whole."

Since the evidence we have reviewed is sufficient to sustain the jury's verdict, we turn to the several contentions of the appellants that portions of that evidence were improperly admitted and that other errors occurred during the course of the trial.

The statement made by Galgano to Botto in October 1956, that he had supplied Ralph Russano with heroin, was admitted only against Galgano; and was properly so received as an admission by Galgano of his role in the conspiracy. 4 Wigmore on Evidence §1048 (3d Ed. 1940). Galgano, however, contends that the admission was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84 (1954). We think that, with respect to Galgano, Russano's disclosure to Botto that Galgano was his supplier (provided this conversation is admissible), together with the Bankers Trust Company envelopes found in Galgano's possession, constitute sufficient independent evidence of participation in the conspiracy to corroborate Galgano's admission and thus to satisfy the requirements of the *Opper* case. Galgano further contends, however, that Russano's statement to Botto implicating Galgano was hearsay and was not admissible against him. We disagree with Galgano.

The declaration of a conspirator is admissible against a co-conspirator if there is independent evidence of the existence of the conspiracy, *Glasser* v. *United States*, 315 U. S. 60 (1942), and if the declaration is in furtherance of the conspiracy, *Krulewitch* v. *United States*, 336 U. S. 440 (1949). Galgano's admission, properly admitted whether or not it was corroborated, provided sufficient independent evidence of the existence of the conspiracy to satisfy the first requirement. We believe that Russano's statement to Botto naming Galgano as a source of supply from whom a better quality of heroin might be obtained, must be considered as in furtherance of the conspiracy. Botto was a regular customer of Russano. He complained to Russano

of the quality of the heroin which he was obtaining from the latter. Russano indicated that he could obtain pure heroin, and in response to Botto's question, stated that Galgano was the source of supply. We understand this statement to be further assurance that a better quality heroin was available and therefore in furtherance of the conspiracy to distribute narcotics.

Galgano's contention that the Bankers Trust Company envelopes were inadmissible at the trial is also without merit. Similar envelopes, shown to be connected with the conspiracy, had already been introduced into evidence. While Galgano had the right, which he exercised, of offering other explanations for his possession of the envelopes, the fact that this evidence, standing alone, might not have been sufficient to sustain a conviction did not affect its admissibility. It was relevant as bearing upon his connection with the conspiracy. Cf. *Sanders* v. *United States*, 238 F. 2d 145 (10 Cir. 1956).

The appellants Carminati and McKenney, relying on *Alford* v. *United States*, 282 U. S. 687 (1931), urge as ground for reversal that two witnesses for the Government, Oglesby and Schwartz, were excused from giving their addresses on cross-examination. In *Alford* the Supreme Court held that a witness may be cross-examined as to his residence because this information would enable the jury to identify the witness in his environment, might, under some circumstances, provide new avenues of exploration for defense counsel. With these factors in mind, we turn to the facts of the present case. With respect to Oglesby, the claim is frivolous. Appellants

obtained all the information about his residence that they asked of him. Nor is there any merit in their contention that they were erroneously denied knowledge of the residence of Schwartz. Schwartz was a witness for the Government and during his cross-examination counsel for one of the defendants questioned Schwartz about certain transactions occurring during June 1956. His question as to the address of the witness at that time was met by an objection from the Government which was sustained by the court. The only information which was elicited was that Schwartz resided in the Bronx. During the testimony of the very next witness, however, Schwartz's address was revealed. Under the circumstances of this case, we cannot find that the appellants were injured by the ruling curtailing Schwartz's cross-examination or that the ruling was reversible error. Schwartz had undergone thorough cross-examination. He had testified that he lived with his parents in the Bronx and he gave full details of past and present employment. His testimony further revealed that he had pleaded guilty and was awaiting sentence in the present case, that he had never before been an informer or witness for any prosecutor in a criminal case, that he had no previous criminal record, and that he did not use narcotics. This testimony gave the jury ample information with which to determine the credibility of the witness. Furthermore, although the next witness revealed Schwartz's address, defense counsel did not attempt to recall him or in any way seek to make use of this information.

Carminati seeks a reversal of his conviction because of an incident which occurred during the testimony of Botto.

Botto testified that he was arrested on the conspiracy charge and taken to the West Street jail. He related a conversation he had while there with Rich, a codefendant, in which Rich stated that Carminati was Ralph Russano's connection. Counsel objected to the testimony. The court ordered it stricken and instructed the jury to disregard it. If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, *Graham* v. *United States*, 15 F. 2d 741 (8 Cir. 1926), reversal would be required. *Krulewitch* v. *United States, supra:* But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made. The testimony was stricken as soon as counsel made known his objection, the trial court then proceeding at once to protect the defendant's rights. No error was committed.

Other issues raised by Carminati and McKenney deserve only brief mention. Both object to the charge of the trial court that "constructive possession" of a narcotic drug is sufficient to raise the presumption created by 21 U. S. C. §174. However, the charge was contained in that portion of the instructions which dealt with the substantive counts against another defendant not involved on this appeal and did not deal with the conspiracy. Under these circumstances, even if the charge was erroneous, as to which we express no opinion, the appellants would have no ground for complaint.

Carminati assigns as error that portion of the trial court's summation of the evidence dealing with Oglesby's testimony. The trial court, in an unqualified statement, re-

ferred to Carminati as the man whom Oglesby had identified as being involved in a certain transaction. Carminati contends that Oglesby had testified only that Carminati resembled the man whom he had seen, but on the whole record it is clear that the trial court was correct in its summation.

Nor was there error in the refusal of the trial court to provide the jury with a full set of the minutes. We have previously recognized that this is a matter within the discretion of the trial court, *U. S.* v. *Rosenberg*, 195 F. 2d 583 (2 Cir. 1952). Moreover, it is evident from the record that in the present case the jury obtained all of the information which it had requested.

Other errors alleged by the appellants to have been committed during the course of the trial have been considered by us, but they are without merit and do not warrant discussion.

Judgments affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 496

MICHAEL GALGANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 497

ANTHONY CARMINATI AND WILLIAM MCKENNEY, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 15–26)[1] is not reported.

[1] References are to the petition and record in No. 496 unless otherwise noted. "R. I" refers to the petitioner's appendix and "R. II" refers to the appendix for the United States in the Court of Appeals.

JURISDICTION

The judgments of the Court of Appeals were rendered on August 23, 1957. The petitions for writs of certiorari were filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 497:

1. Whether the government proved a single conspiracy in which petitioners participated.

2. Whether the district court erred in various rulings during the trial.

In No. 496:

3. Whether admissions of petitioner Galgano to a witness had to be and were corroborated; and whether physical evidence introduced against him was relevant.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of New York of conspiracy to sell heroin in violation of the federal narcotic laws (R. I, 6, 17–19). Galgano, the petitioner in No. 496, and Carminati, one of the petitioners in No. 497, were each sentenced to imprisonment for ten years, and McKenney to imprisonment for five years (R. I, 7–9). On appeal, the judgments were affirmed.

Michael Botto, a government witness and co-defendant in the indictment, testified that in 1955 and 1956 he, Ralph Russano, and petitioner McKenney dealt in heroin together (R. II, 31–37). Botto testified that during this time he received supplies of heroin from

Russano (R. II, 26). In October 1955, when Botto complained to Ralph Russano about the quality of heroin supplied to him, Ralph said that if Botto was willing to pay more money, (Russano) could get better stuff from "Black Mike" (identified by the witness in court as Galgano) (R. I, 24–26). A few days later, Botto told Galgano he was paying $400 an ounce for the "stuff" Ralph said he was getting from Galgano, and Galgano told him that "when he gave the stuff to Ralph the stuff was all right" (R. I, 29).[2]

Botto received deliveries of narcotics from Ralph Russano in a glassine bag inside a bank envelope (R. I, 26). When Galgano was arrested at his home on November 19, 1956, ten empty Bankers Trust Company envelopes were found on a table in Galgano's living room (R. I, 35–37).[3]

Ralph Russano and Salvatore Russano (his father) also supplied narcotics to government witness Ogelsby in 1955 and 1956 (R. II, 14). In October 1955, in a bar, Ogelsby overheard Ralph say something to three unknown men about three ounces of heroin. Russano made a phone call. Soon afterward another man appeared, talked to Russano and the three men, and then they all left (R. II, 4–6). Several nights later the same three men appeared again. They talked with Russano and he made another phone call. In a short while a man whom Ogelsby identified as Carminati

[2] This testimony was admitted only against Galgano (R. I, 29).

[3] Other conspirators were shown to have used the same type of bank envelopes for narcotics (R. II, 62–63).

appeared, and at one point said "Three the night before and seven tonight? What is happening to those guys?" (R. 7–9). In December 1955, Ogelsby, when told by Ralph that he would have to be satisfied with seven ounces of "cut heroin", refused to take it (R. II, 15). After Ralph made a telephone call, Carminati came in and told Ogelsby "I am sorry, big boy, but you will have to take seven ounces of cut stuff, which is the best we can do."

Arrangements were made in August 1955 or 1956 for Ralph to make a delivery of heroin to Ogelsby; but, because Ralph was unable to make the appointment, McKenney made the delivery (R. II, 19–22). In the same month, Sal Russano, in the presence of McKenney, said that he, Sal, would have to let matters cool for a while, but that in the meantime McKenney would take care of things (R. II, 18–19).

ARGUMENT

1. The petitioners in No. 497, Carminati and McKenney, contend that the proof offered by the government showed only separable and unrelated transactions, and falls short of showing a conspiracy implicating them in a scheme to receive, possess, and sell heroin. On the facts proved, however, the jury was justified in finding a single conspiracy to buy and sell heroin for profit. It involved two suppliers (Carminati and Galgano) who sold to a group of middlemen (Ralph and Sal Russano and McKenney) for the purpose of resale, with the middlemen in turn selling to retailers (Botto, Ogelsby, and others) for the purpose of resale to various consumers. There

was ample evidence to show that Carminati and Galgano supplied the Russanos with heroin on more than one occasion realizing that the heroin would be resold by the Russanos. And there was sufficient evidence to show that petitioner McKenney actively participated with the Russanos in their sales of heroin. (See the Statement, *supra*.) Each of the conspirators knew that he was part of a larger venture in which others were contributing to a common end. The case therefore falls within the pattern of *Blumenthal* v. *United States*, 332 U. S. 539, rather than *Kotteakos* v. *United States*, 328 U. S. 750, on which petitioners rely. See also *United States* v. *Tramaglino*, 197 F. 2d 928 (C. A. 2), certiorari denied, 344 U. S. 864, involving a conspiracy much like the one here shown.

2. The allegations of trial error by the petitioners in No. 497 are without substance.

A. They contend that their cross-examination of two government witnesses, Ogelsby and Schwartz, was improperly curtailed when the witnesses, at the request of the government, were excused from giving their addresses (R. II, 23–25, 57). Ogelsby, however, was asked and did give on cross-examination his address at the time of his arrest, which was the only address in which counsel expressed an interest (R. II, 25).

Schwartz, a co-defendant, testified as to purchases from Rich (a customer of the Russanos), and did not in his testimony implicate any of the petitioners. He was not required to give his exact address, but he did testify that he lived with his parents in the Bronx; gave details of his past and present employment; revealed that he pleaded guilty and was await-

ing sentence in the present case; that he had never been an informer or witness for any prosecutor in a criminal case; that he had no previous criminal record, and that he did not use narcotics (R. II, 57–59; Pet. App. 29). Moreover, Schwartz' exact address was revealed upon cross-examination of the very next government witness, John Doyle (R. II, 60).

B. During the direct examination of Michael Botto, the government's attorney asked him whether, after his arrest, he had talked to Frank Rich at West Street. Botto replied that he had talked to Rich. Then Botto went on to say that Rich told him that Tony Carminati was Ralph Russano's connection. Defense counsel objected and the court struck the testimony from the record (Pet. 14). Petitioner Carminati and McKenney insist that the receipt of such evidence was error which could not be eradicated by striking it from the record and instructing the jury to disregard it. The trial court's prompt action was sufficient to overcome any prejudice that might have resulted from Botto's response. It is presumed that a jury follows instructions. *Delli Paoli* v. *United States*, 352 U. S. 232; *Opper* v. *United States*, 348 U. S. 84.

C. Petitioners also assert that it was error to permit Ogelsby to testify to overhearing conversations among Russano and three unidentified men in a bar (see the Statement, *supra*, pp. 3–4). Carminati was shown to have appeared on the scene following the second conversation under circumstances suggesting that the first was part of a general pattern. The testimony was, therefore, properly admitted as showing the nature of the conspiracy.

D. Carminati and McKenney contend that the court erred when it charged that "[p]ossession of any sort—either actual or constructive—is sufficient to raise the presumption" (R. I, 79) of guilt under 21 U. S. C. 174. The charge was correct. *United States* v. *Cohen*, 124 F. 2d 164 (C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States*, 315 U. S. 811, rehearing denied, 316 U. S. 707. And in any event it dealt with the substantive count against another defendant.

E. In discussing Ogelsby's testimony implicating petitioner Carminati, the court, in its charge, stated that one of the persons with whom Ogelsby dealt in heroin was the man "whom he identified in this courtroom as the defendant Anthony Carminati" (R. I, 68). Petitioners argue that Ogelsby's identification was at best equivocal and that it was therefore error to charge as the court did.

When asked if defendant Carminati was the man with whom he dealt, Ogelsby replied:

> * * * looks exactly like him (R. II, 22)

and further:

> Q. Are you sure that this is the man that you saw on those occasions? A. As far as I know, yes.
>
> Q. There is no doubt in your mind about that, is that right? A. That is right. [R. II, 22.]

In the light of this testimony, the court's charge was fully justified.

F. Petitioners cite as error the court's refusal to read the full set of trial notes to the jury. The court did not, as petitioners charge, refuse the request

of the jury. Emphasizing that the trial record contained four or five hundred pages, the court asked the jury if they would specify the portions of testimony they wanted repeated (R. I, 96). The jury did this and following their request the court had the designated portions read aloud (R. I, 96–100).

3. There is no merit in the argument of petitioner Galgano in No. 496 that the admission by him to Botto that he was supplying narcotics to Russano was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84.

A. Galgano's admission was made while the conspiracy was still in progress, not after the crime had been completed. As such it did not require corroboration. *Warzower* v. *United States*, 312 U. S. 342, 347.

Moreover, as the court below pointed out (Pet. App. 22–23), the admission was corroborated by Russano's statements to Botto, in furtherance of the conspiracy, that he got good quality heroin at a higher price from Galgano.

B. Petitioner Galgano also contends that the 10 paper envelopes (Government Exhibit 33) were inadmissible because they bore no relation to the trial and substantially prejudiced him. Similar envelopes had been introduced into evidence against other conspirators by the government (Government Exhibits 7 and 18). It was shown by the government that these envelopes were used by the conspirators to deliver heroin (R. I, 27, 35; R. II, 62–63). Identical envelopes found in Galgano's home would be some evidence of his

participation in narcotic transactions. Thus, these envelopes were relevant and were properly admitted.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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